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IN THE

Supreme Court of the United States

October Term, 1997

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether The United States Court Of Appeals For The Third Circuit Erred In Holding That Causation Is Not An Element Of CERCLA Section 107(a) Liability.

II. Whether the United States Court of Appeals For The Third Circuit Erred In Holding That Concentration Thresholds Are Not Implicit In The Definition of Hazardous Substances In CERCLA Section 101(14), Thereby Expanding The Definition To Encompass Everything In The Universe.

III. Whether The United States Court Of Appeals For The Third Circuit Erred In Shifting The Burden To Alcan To Prove The Absence Of Causation In Order To Limit Or Avoid CERCLA Section 107(a) Liability And Ease Government Enforcement Efforts.

IV. Whether The United States Court Of Appeals For The Third Circuit Erred In Requiring Alcan To Prove Its Emulsion As A Whole Was Environmentally Harmless In Order To Limit Or Avoid CERCLA Section 107(a) Liability, Even Though The Emulsion Contained None Of The Hazardous Substances Which Triggered EPA's CERCLA Response.

V. Whether The United States Court Of Appeals For The Third Circuit Erred In Ignoring Alcan's Motion To Dismiss For Lack Of Subject Matter Jurisdiction And Thus Failing To Apply To CERCLA The Strong Presumption Against Retroactivity In The Manner Articulated By This Court In *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994).

RULE 29.6 STATEMENT

Petitioner, Alcan Aluminum Corporation, is a wholly owned subsidiary of Alcan Aluminium Limited, a corporation organized and existing under the laws of Canada.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the Middle District of Pennsylvania adopting the Report and Recommendation of the Magistrate Judge which relied on the decision of the United States District Court for the Northern District of New York in United States v. Alcan Aluminum Corp., 755 F. Supp. 531 (N.D.N.Y. 1991), printed in the Appendix at A-75, granting summary judgment in favor of the United States, was issued on May 8, 1991. That Memorandum Opinion is unreported and is printed in the Appendix at A-1; the Order dated May 8, 1991 is printed in the Appendix at A-3.

The Opinion of the United States Court of Appeals for the Third Circuit reversing the grant of summary judgment and remanding the case for a hearing on apportionment of harm is reported at 964 F.2d 252 (3d Cir. 1992), and printed in the Appendix at A-4.

The Memorandum Opinion and Order of the United States District Court for the Middle District of Pennsylvania granting summary judgment in favor of the United States and denying petitioner's motion for summary judgment is reported at 892 F. Supp. 648 (M.D. Pa. 1995), and printed in the Appendix at A-50.

Petitioner's Motion for Reconsideration or to Alter or Amend the Judgment was denied by Memorandum Opinion and Order and Order dated October 4, 1995. The Memorandum Opinion and Order is unreported and is printed in the Appendix at A-103.

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the decision of the district court without opinion is reported at 96 F.3d 1434 (3d Cir. 1996), and is printed in the Appendix at A-102.

The Order denying Petitioner's Request for Rehearing with Suggestion for Rehearing *In Banc* was entered December 16, 1996. The Order is unreported and is printed in the Appendix at A-105.

JURISDICTION

Subject matter jurisdiction in the United States District Court for the Middle District of Pennsylvania was predicated on § 113(b) of CERCLA, 42 U.S.C. § 9613(b) and 28 U.S.C. § 1345. A Memorandum Opinion and Order was issued by the district court on May 8, 1991 adopting the Magistrate Judge's Report, granting the United States' motion for summary judgment and entering judgment in favor of the United States in the amount of $473,790.18.

Petitioner timely appealed to the United States Court of Appeals for the Third Circuit in accordance with 28 U.S.C. § 1291 on June 5, 1991. The Court of Appeals remanded the case to the district court for a hearing on the issue of the apportionment of harm in an Opinion dated May 14, 1992.

The United States District Court for the Middle District of Pennsylvania granted the United States' Motion for Summary Judgment on remand in a Memorandum Opinion and Order dated June 28, 1995. Petitioner filed a Motion for Reconsideration or to Alter or Amend the Judgment on July 13, 1995, which was denied by Memorandum Opinion and Order dated October 4, 1995.

Petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the Third Circuit on October 24, 1995. The Court of Appeals affirmed the district court without opinion in a Judgment Order dated August 22, 1996. Petitioner filed a

Petition for Rehearing with Suggestion for Rehearing *In Banc* on October 7, 1996. That Petition was denied by Order dated December 16, 1996.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1), and in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution art. III.
Section 101(14) of CERCLA, 42 U.S.C. 9601(14).
Section 107(a) of CERCLA, 42 U.S.C. 9607(a).

STATEMENT OF THE CASE

In the late 1970's petitioner Alcan Aluminum Corporation ("Alcan") produced a waste rolling oil emulsion which consisted of 95% water and 5% mineral oil (a biodegradable organic material similar to petroleum jelly) (the "Emulsion"). From mid-1978 through late 1979, Alcan paid a state licensed oil recycler to treat the Emulsion and reclaim the oil. Instead, unknown to Alcan, the recycler disposed of the Emulsion, along with the wastes of other customers, by dumping it into an abandoned coal mine adjacent to the Susquehanna River known as Butler Tunnel (the "Tunnel").

In September 1985, Hurricane Gloria swept through the area. As a result of excessive rainfall associated with the hurricane, wastes that had been deposited in the Tunnel during the late 1970's were released into the Susquehanna River ("the Release").

The United States Environmental Protection Agency ("EPA") responded to the Release under the Comprehensive Environmental Response, Compensation and Liability Act , 42 U.S.C. § 9607 et seq. ("CERCLA") (the "Response") after having identified certain "hazardous substances", as that term is defined in section 101(14) of CERCLA, 42 U.S.C. § 9601 (14) ("CERCLA Hazardous Substances").

In November 1989, respondent the United States of America (the "Government") sued 20 defendants, including Alcan, under section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover $1,302,290.18 in remediation costs. Section 107(a) imposes liability for response costs caused by an actual or threatened release of CERCLA Hazardous Substances. The evidence is uncontroverted that neither the water nor the mineral oil of the Emulsion is a CERCLA Hazardous Substance. It is also uncontroverted that the Emulsion contained none of the CERCLA Hazardous Substances identified by EPA as having necessitated the Response.[1]

The Government recovered a disproportionately small percentage of EPA's response costs from other defendants whose wastes *did* contain the CERCLA Hazardous Substances which triggered the Response. The Government then moved for summary judgment against Alcan seeking the imposition of joint and several liability for $473,790.18 in unreimbursed response costs.

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[1] The Response was driven by 17 "hazardous substances" which were identified as "Consent Order Constituents" and ranged from benzene to xylene. Joint Appendix on Remand in the District Court at 170.

The Government's case rested exclusively on the presence of low-level ("trace") heavy metal compounds ("Trace Metals") in the Emulsion. These Trace Metals are ubiquitous. They occur virtually everywhere, including air, water and soil, in higher concentrations than in the Emulsion. Moreover, EPA had identified no metals problem in the Release. In fact, neither the Emulsion as a whole nor any constituent of the Emulsion corresponded to any of the CERCLA Hazardous Substances which triggered the Response. Furthermore, the remediation method employed by EPA was technically incapable of even addressing the Emulsion. Despite these undisputed facts and based solely on the presence of below-background levels of Trace Metals in the Emulsion, the United States District Court for the Middle District of Pennsylvania imposed joint and several liability and in May 1991, entered judgment against Alcan in the amount of $470,790.18. Alcan appealed.

The Court of Appeals for the Third Circuit held that the Trace Metals in the Emulsion--without regard to concentration levels--met the definition of CERCLA Hazardous Substances. The Court went on to hold that "a CERCLA plaintiff need not establish a causal connection between a generator's hazardous substances and the release or incurrence of response costs." *United States v. Alcan Aluminum Corp.*, 964 F. 2d 252, 271 (3d Cir. 1992) ["*Alcan-Butler I*"]. Under this formula, the mere presence of the Emulsion (with its Trace Metal constituents) among the wastes released from the Tunnel and the fact that EPA incurred remediation costs in responding to the Release, sufficed to establish the Government's *prima facie* case. *See Alcan-Butler I*, 964 F.2d at 264-266.

However, the Court of Appeals recognized that "there must be some reason for the imposition of

CERCLA liability." *Alcan-Butler I,* 964 F.2d at 270. The court observed:

> The foregoing conclusions that (1) there is no quantitative threshold in the definition of hazardous substances and (2) the plaintiff need not establish a causal connection between a given defendant's waste and the release or the incurrence of response costs would initially appear to lead to unfair imposition of liability. As Alcan asserts, this definition of "hazardous substances" effectively renders everything in the universe hazardous, including, for example, federally approved drinking water. When this definition is read in conjunction with the rule that specific causation is not required, CERCLA seemingly would impose liability on every generator of hazardous waste, although that generator could not, on its own, have caused any environmental harm.

Alcan-Butler I, 964 F.2d at 267. Consequently, the Court of Appeals adopted a modified version of the "divisibility of harm" approach[2] to the liability of joint tortfeasors set forth in section 433A of the *Restatement (Second) of Torts*, and shifted the burden to Alcan to rebut the presumption that it caused or contributed to the release and the resultant response costs. *Alcan-Butler I,* 964 F.2d at 267-270. The court remanded the case for a hearing, holding:

> If Alcan can establish . . . that the harm is capable of reasonable apportionment, then it

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[2] The Court of Appeals suggested that this approach "should assuage Alcan's fear that liability under CERCLA will be as far-reaching as the definition of hazardous substances." *Alcan-Butler I,* 964 F.2d at 261 n.13.

> should be held liable only for the response costs relating to that portion of harm to which it contributed. *Further, if Alcan can establish that the hazardous substances in its emulsion could not, when added to other hazardous substances, have caused or contributed to the release or the resultant response costs, then it should not be liable for any of the response costs.*

Alcan-Butler I, 964 F.2d at 271 (emphasis added).[3]

On remand both Alcan and the Government again moved for summary judgment. The district court granted the Government's motion and reimposed joint and several liability on Alcan without a hearing. The district court accepted as true Alcan's factual assertion that there was absolutely no connection between the constituents of the Emulsion, including the CERCLA Hazardous Substances (Trace Metals), and the substances necessitating EPA's CERCLA response to the Release. *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648, 654 & n.9 (M.D. Pa. 1995) *[Alcan-Butler II]*. However, the district court agreed with the Government that the presence of

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[3] Earlier in its opinion the Court of Appeals phrased this inquiry as whether "the emulsion did not or could not, when mixed with other hazardous wastes, contribute to the release and the resultant response costs." *Alcan-Butler I*, 964 F.2d at 270. The Government seized upon this language to urge on remand that this was the Court of Appeals' "true" holding, and that it required Alcan to prove that its "emulsion as a whole" was incapable of causing any harm to the environment. *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648, 650, 653 (M.D. Pa. 1995). This led the district court on remand to adopt the "environmentally harmless" standard in lieu of the standard articulated by the Court of Appeals in the emphasized portion of the quotation above.

constituent Trace Metals transformed the "entire emulsion" into a hazardous substance. Because Alcan failed to prove that its Emulsion "as a whole" was "environmentally harmless", the district court denied its motion for summary judgment, granted the Government's motion and on October 4, 1995, entered judgment against Alcan for the entire $470,790.18 balance of EPA's unreimbursed response costs. *Alcan-Butler II*, 892 F. Supp. at 655, 656.

Alcan again appealed. While the appeal was being briefed, the United States District Court for the Southern District of Alabama rendered a decision based on this Court's opinion in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). *United States v. Olin Corp.*, 927 F. Supp. 1502 (S.D. Ala. 1996). The *Olin* court concluded that the holding of *Landgraf* precluded the application of liability under CERCLA section 107(a), 42 U.S.C. § 9607(a), to disposals that took place before CERCLA was enacted. All of the Emulsion was disposed of before CERCLA was enacted. Alcan consequently filed a motion in the Court of Appeals for the Third Circuit seeking dismissal of this case for lack of subject matter jurisdiction. Alcan based the motion on this Court's retroactivity test set forth in *Landgraf*, as applied to CERCLA in *Olin*.

On August 12, 1996, a three-judge panel of the Court of Appeals affirmed the judgment of the district court without opinion. *See United States v. Alcan Aluminum Corp.*, 96 F. 3d 1434 (3d Cir. 1996). Alcan's motion to dismiss for lack of subject matter jurisdiction was neither acknowledged nor addressed. At oral argument, the *Alcan-Butler II* panel had conceded that Alcan established beyond dispute that the Hazardous Substances in its Emulsion did not

cause or contribute to the response costs for which it was held jointly and severally liable. The *Alcan-Butler II* panel also conceded that Alcan complied with the following directive in *Alcan-Butler I*:

> [I]f Alcan can establish that the hazardous substances in its emulsion could not, when added to other hazardous substances, have caused or contributed to the release or the resultant response costs, then it should not be liable for any of the response costs.

Alcan-Butler I, 964 F.2d at 271. However, the *Alcan-Butler II* panel declined to follow that holding, characterizing it at oral argument as a "slip-up" in the *Alcan-Butler I* opinion. Instead, the *Alcan-Butler II* panel stated that Alcan could not avoid liability because it failed to satisfy the district court's standard on remand: that the "emulsion as whole" was "environmentally harmless."

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. § 1345 and 42 U.S.C. § 9613(b). This Petition is filed pursuant to 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT ALCAN'S PETITION FOR CERTIORARI TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS AND AT THE SAME TIME SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE SCOPE OF LIABILITY UNDER SECTION 107(A) OF CERCLA.

This case presents the Court with a unique opportunity to focus on and resolve seminal issues in

the Superfund liability scheme. The enactment of Superfund has created a governmentally driven program to clean up past hazardous substances estimated to cost $500 billion to $1 trillion. The law establishes standards for making those responsible pay these costs. But EPA, in an effort to maximize its power and its cost recovery revenues, has advanced a construction of the statute that Congress could not possibly have intended and that cannot possibly be consistent with the Constitution. Accepting EPA's lead, the court below held that a release of virtually any substance triggers Superfund liability, and consequently a party whose waste had no causal connection whatsoever to the harm which was remedied was held strictly liable for a massive and disproportionate share of response costs. This result exposes a serious problem in our judicial system caused by the lack of uniformity in legal doctrine.[4]

Decisions of the various courts of appeals are in hopeless disarray with respect to these issues. For example, is liability automatic for disposing of anything in the universe? Or does the statute require a showing of causation between the waste at issue and the response costs? Can joint and several liability be avoided if there is "any" reasonable basis for divisibility of the harm? Or can liability be avoided only upon a

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[4] [T]he importance of uniformity in the application of law is an important part of our jurisprudence. Justice Ginzberg once wrote: 'Uniformity promotes the twin goals of equity and judicial integrity . . . .' Judge Friendly considered uniformity 'the most basic principle of jurisprudence.'

Joseph F. Weis Jr., *Disconnecting the Overloaded Circuits--A Plug for a Unified Court of Appeals*, 39 St. Louis L.J. 455, 458 and nn.10-11 (1995) [hereinafter "Weis"]. Judge Weis is the former chairman of the Federal Courts Study Committee.

showing that the waste as a whole is environmentally harmless? Who bears the burden of making such a showing? Resolution of the these issues requires the immediate attention of this Court.[5]

A. This Court Should Settle The Important Question Of Whether Causation Is An Element Of CERCLA's Liability Scheme.

There is perhaps no more fundamental element of American jurisprudence than the concept that liability should not be imposed on someone unless they are in some way connected with the damages for which they are being held liable. This notion of fairness has been enshrined in the concept of causation. There is sharp disagreement between the First Circuit on the one hand and the Second and Third Circuits on the other, as to whether section 107(a) liability may be imposed without a finding of causation. The Second and Third Circuits have flatly declared that causation is not part of the CERCLA liability scheme.[6] *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993)

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[5] If we were talking about laboratory cultures or seedlings, the concept of issues 'percolating' in the courts of appeals for many years before they are really ready to be decided by the Supreme Court might make some sense. But it makes very little sense in the legal world in which we live . . . . It is of little solace to a litigant who lost years ago in a court of appeals to learn that his case was part of the 'percolation' process which ultimately allowed the Supreme Court to vindicate his position.

Weis at 462, n.33, quoting William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U.L. Rev. 1, 11 (1986).

[6] These courts have responded to the repeated requests by the government to ease its enforcement burden--it is, of course, easier to impose liability if you do not have to prove anything.

[*"Alcan-PAS"*]; *Alcan-Butler I*, 964 F.2d at 265. The Third Circuit's motivation for concluding that the statute requires no showing of causation is the proof problems plaintiffs would face if they were required to trace the cause of the response costs to each responsible party. *Alcan-Butler I*, 964 F.2d at 267. The Second Circuit agreed. *Alcan-PAS*, 990 F.2d at 721.

The First and Eighth Circuits take a wholly different approach and require that plaintiffs show a causal connection between the release and the defendant's waste. As Judge Robert E. Keeton, summarizing the First Circuit's position, states:

> Thus, *Dedham I*, rather than supporting Plaintiff's argument that there is no causation element in a CERCLA case, holds, exactly to the contrary, that a causal connection between the waste discharged and the need for the response costs must be proved.

Acushnet Company v. Coaters, Inc., 937 F. Supp. 988, 997 (D. Mass. 1996) *[Acushnet I]* (construing *Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146 (1st Cir. 1989); *see Farmland Indus. v. Morrison-Quirk Grain Corp.*, 987 F.2d. 1335, 1340 (8th Cir. 1993) ("a private party cannot predicate a claim for contribution or indemnity solely upon section 9607(a) liability to the government, but must also prove causation").

In *Acushnet I*, Judge Keeton held that a plaintiff must show causation to establish section 107(a) liability. In *Acushnet I*, one of the problems identified at the site was PAHs (polycyclic aromatic hydrocarbons). The defendant, New England Telephone and Telegraph ("NETT"), had disposed of telephone pole butts that were saturated with creosote containing PAHs. *Acushnet I*, 937 F. Supp. at 990-991. However, PAHs in used creosote-treated

utility pole butts could not have leached into the surrounding soil to create a level of PAHs in the soil greater than the pre-existing background levels. *Acushnet I*, 937 F. Supp. at 992-993.

Similarly, in this case none of the chemicals that required remediation at the site was found in the Emulsion, which was primarily water. Moreover, the mineral oil in the emulsion was in a highly stable state and would not float. Thus, the remedy, oil booms which collected materials floating on the top of the water, was totally ineffective in even collecting the Emulsion, which passed under the booms.

The plaintiffs in *Acushnet I* argued that they did not need to prove:

> . . . any connection between any toxic substance in NETT's waste and the response costs being incurred by a plaintiff. Under Plaintiffs' legal theory, as long as any response costs are being incurred by a plaintiff, any party that disposed of any hazardous substance is liable to compensate that plaintiff. It does not matter what type or amount of hazardous substance was disposed of by the party. Any hazardous substance in any quantity will open the floodgates of liability, and will do so even if the hazardous substance disposed of by the party is not causing any harm, is not threatening to cause any harm, and is not any part of the reason a response is needed and the costs of that response are incurred.

Acushnet I, 937 F. Supp. at 993.

Judge Keeton concluded "that Plaintiffs' argument regarding causation under section 107 of CERCLA is

unsupported in law." *Acushnet I*, 937 F. Supp. at 1001. He relied upon *Alcan-PAS* and *Alcan-Butler I*, as well as *Dedham I*, in reaching this conclusion. Remarkably, he focused on the *Alcan-Butler I* test for causation--the same test which was later eviscerated by the *Alcan-Butler II* panel's endorsement of the "environmentally harmless" test:[7]

> After the government has established a prima facie case, without proof of causal connection between a *defendant's waste and response costs,* the framework established by the Third Circuit shifts the burden to the defendant to show that its waste was not a cause of the response costs.
>
> * * *
>
> In another case that the United States initiated against Alcan Aluminum Corp., the Second Circuit adopted the burden-shifting methodology used by the Third Circuit in its Alcan case . . . . Thus, under the formulations employed by both the Second and Third Circuits, *causal connection between a defendant's waste and the government's response costs is an element of liability.* . . .

Acushnet I, 937 F. Supp. at 998-999 (emphasis added). In this case Judge Keeton would undoubtedly have concluded, based on his review of the standards

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[7] The *Alcan-Butler II* panel affirmed a district court which had construed *Alcan-Butler I* in an altogether different manner than Judge Keeton construed it in *Acushnet I*. Causation was irrelevant; the court, in effect, held that Alcan was required to demonstrate that its waste met some platonic ideal of environmental harmlessness.

in *Alcan-Butler I* and *Alcan PAS*, that because of the absence of any causal connection between the incurrence of response costs and the toxic constituents of the Emulsion, Alcan would not be liable for any response costs.

The "environmentally harmless" standard which the Third Circuit affirmed in *Alcan-Butler II* is utterly meaningless. No one, including the Third Circuit, can explain what environmentally harmless means. Too much molasses in a stream will remove the dissolved oxygen and kill the fish. Environmental problems are relative issues, not absolute issues. The Third Circuit in *Alcan-Butler II* has applied a standard that is the substantive equivalent of saying that it is perfectly proper to incarcerate someone who happened to be in the bank at the time it was robbed--even though there is no dispute that the person did not rob the bank--because the person could not prove his or her own inherent goodness.[8]

B. This Court Should Resolve The Conflict Among The Courts Of Appeals For The Second, Third, And Fifth Circuits Concerning The Standard For Proving Divisibility Of Harm

Subsequent to the decision in *Alcan-Butler I*, the Court of Appeals for the Fifth Circuit held that joint

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[8] In addition, no court has offered a plausible explanation why there should be disparate treatment between government plaintiffs and private plaintiffs. The statutory language makes no such distinction. This unexplained quirk of judicial interpretation has led to a loophole that has effectively allowed private plaintiffs to avoid their burden of proof by entering into favorable settlements with the government and leaving the contribution action to the government.

and several liability could be avoided under CERCLA if there is "a reasonable basis for apportionment" of the harm. *United States v. Sequa Corp. (In Re Bell Petroleum Services)*, 3 F.3d 389 (5th Cir. 1993), *aff'd in part, rev'd and remanded in part on other grounds sub nom United States v. Bell Petroleum Services*, 64 F.3d 202 (5th Cir. 1995). In *Bell Petroleum* the problems at the site involved elevated levels of chromium in the groundwater. EPA sought to impose joint and several liability against Sequa, one of the three defendants which had disposed of the chrome plating waste containing chromium at the site. Unlike the Emulsion, Sequa's waste was, in fact, a "real" hazardous substance which actually caused the response costs. Recognizing that Sequa had shown a reasonable basis for apportioning the harm based on the volume of plating waste it had contributed, the Fifth Circuit refused to hold Sequa jointly and severally liable for EPA's response costs.

The divisibility standard adopted by the Second Circuit in *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993) ("*Alcan-PAS*") was the same standard promulgated in *Alcan-Butler I*. However, the interpretation of the standard adopted by the district court in *Alcan-Butler II* on remand and by the district court in *Alcan-PAS* on remand are contradictory. In a recent order the district court in *Alcan-PAS* made it clear that its inquiry was limited to the nature of the *hazardous substances* in the Emulsion and their connection to the response actions at the site. *United States v. Alcan Aluminum Corporation*, 1996 U.S. Dist. LEXIS 16351 at *2, 26-27 (N.D.N.Y. Oct. 25, 1996). The conflict between *Alcan-PAS* and *Alcan-Butler II* is blatant, since both cases involve the Emulsion.

The clear split among the Circuits produces a result that defies common sense--it enables a generator of a clearly hazardous material causing response costs (Sequa in *Bell Petroleum*) to escape from joint and several liability, while the generator of an innocuous waste (Alcan) is held jointly and severally liable for all unreimbursed response costs.

C. The Failure Of The Three-Judge Panel In *Alcan-Butler II* To Follow The Law Of The Case In *Alcan-Butler I* So Far Departs From The Accepted And Usual Course of Judicial Proceedings That It Calls For An Exercise Of This Court's Supervisory Power.

Perhaps as a result of the "percolation" doctrine, different panels of the same circuit have come to feel free simply to disregard holdings of prior panels, sometimes even where, as here, the same case is involved. The percolation doctrine creates enough confusion for the litigant who must guess at the applicable law when conflicts exist among the circuits and its circuit has not ruled.[9] Even more disturbing is the confusion created in a case where, as here, the litigant must guess at the applicable legal standard even *after* the circuit court has ruled in its case.

The *Alcan-Butler II* panel is using silence to escape detection for effectively "overruling" *Alcan-Butler I.* Litigants should be not be required to guess at the appropriate legal standard, particularly if one has been articulated as it was in *Alcan-Butler I.* Even if a court makes a "slip-up" in articulating a standard, if a litigant complies with that standard in good faith, the court should not subsequently redefine the standard as the

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[9] *See* Weis, *supra*, at 461-463.

court did in *Alcan-Butler II* This deprives litigants of effective appellate review and procedural due process.

II. THIS COURT SHOULD GRANT ALCAN'S PETITION FOR CERTIORARI BECAUSE THE LOWER COURT'S CONSTRUCTION OF THE DEFINITION OF "HAZARDOUS SUBSTANCE" IN SECTION 101(14) OF CERCLA TO ENCOMPASS EVERYTHING IN THE UNIVERSE CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT REGARDING STATUTORY CONSTRUCTION, RAISES SIGNIFICANT CONSTITUTIONAL ISSUES AND REQUIRES GENERATORS OF INNOCUOUS WASTE TO SUBSIDIZE THOSE WHOSE WASTE CAUSED THE TYPE OF INJURY WHICH CERCLA WAS TRULY MEANT TO ADDRESS.

A. This Court Should Grant Alcan's Petition For Certiorari To Restore Common Sense To The Meaning Of Hazardous Substances Under CERCLA Section 101(14).

This case raises the compelling issue whether Congress intended to treat everything in the universe as a hazardous substance for purposes of imposing joint and several liability under CERCLA. What this means is that if substances as innocuous as federally approved drinking water, milk and corn flakes--which contain below-background concentrations of heavy metals--happen to have been deposited at the same site as pernicious chemicals such as benzene, the party responsible for generating the innocuous substances may be jointly and severally liable for all of the environmental problems caused by the pernicious chemicals. Interpreting CERCLA to permit this unintended imposition of liability is inconsistent with one of the fundamental tenets articulated by this Court as the basis for statutory interpretation--

"common sense." *See United States v. Standard Oil Co.*, 384 U.S. 224, 225 (1966); *cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486-489 (1977) (remedial provision cannot be interpreted to make recovery entirely fortuitous and authorize damages for losses which are not of the type the statute was intended to forestall).

In *Alcan-Butler I* the Third Circuit found no implied concentration thresholds in the CERCLA section 101(14) definition of hazardous substances. The court's rationale was that Congress did not expressly impose threshold limitations as to concentrations or quantity. Moreover, the Third Circuit in *Alcan-Butler I* construed CERCLA to have no causation requirement. The expansive definition of "hazardous substances" which the Third Circuit upheld in *Alcan-Butler I* becomes even more senseless when read in tandem with the court's holding that causation is not part of the statutory liability scheme. Under such a construction, CERCLA joint and several liability may be imposed for the deposition of garden soil, and yes, even mother's milk, both of which have far higher concentrations of metals compounds than the Emulsion.

What is so troubling is the fact that the Third Circuit seemingly is willing to interpret statutes in a vacuum, ignoring the scientific and practical underpinnings which may not have been explicitly stated by Congress but are required by common sense. Common sense dictates that there are certain implied limitations in definitions that need not be specified. The fact that Congress did not intend its definition to extend to the semantic limits of the language and thereby automatically trigger joint and several liability for garden soil or milk seems obvious, and certainly not a limitation one would think would be necessary to include in a definition. It is also

impractical to define these limitations in advance, making it more likely that Congress left it to the EPA and the courts to make these highly factual determinations on a case-by-case basis.

The silence of Congress cannot logically be viewed as a bar to importing common sense limitations into CERCLA. Judge Keeton stated in *Acushnet I:*

> There are many requirements in CERCLA that, without a doubt, exist yet are not stated in the plain language of § 107. Silence of a statute on a particular matter is not conclusive as to the meaning of the statute in relation to that matter. Silence does not, itself, speak.
>
> Something more than silence, associated with and helping to explain, is essential to manifesting meaning. More often than not silence remains ambiguous with respect to most meanings asserted to be material. A litigant's argument that silence of one section or clause of a statute unambiguously manifests a particular meaning asserted by that litigant is usually insupportable. Plaintiffs' argument in this case, based on the asserted silence of § 107(a) on causation, is no exception. Viewing the matter most favorably to Plaintiffs, one can reasonably say no more than that the asserted silence is ambiguous, and for that reason, it is not alone conclusive against Plaintiffs' argument that no causation need be proved under CERCLA.
>
> In fact, however, reading § 107 as if it were completely silent as to whether some limit is placed on the scope of liability under CERCLA is not even a plausibly reasonable interpretation. The text of subsection 107(a)(4) explicitly

> declares one kind of limit. It limits liability to response costs that are *caused* by a "release or a threatened release."

Acushnet I, 937 F. Supp. at 944 (emphasis in original).

Courts have long acknowledged "CERCLA's 'well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory legislative history.'" *Bell Petroleum*, 3 F.3d at 902 n.13, quoting *Amoco v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989). However, there appears to be some consensus that CERCLA was intended to be a "polluters pay" statute--that is, those parties whose waste streams caused the problem should pay for the problem.[10] In sum, Congress cannot have intended that the presence of elemental metals at levels below naturally occurring background levels is a basis for defining a substance as "hazardous." If indeed Congress intended that liability be imposed only on those persons whose wastes caused the problem being addressed, what the Third Circuit permitted in this case is not even remotely consistent with the "polluters pay" concept. Not only did the court hold Alcan responsible for all the remediation costs associated with CERCLA problems totally unrelated to its waste stream, but it did so to the benefit of those who actually caused the

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[10] *See, e.g., United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 805-806 (S.D. Ohio 1983); *United States v. Sequa Corp. (In Re Bell Petroleum Services)*, 3 F.3d 889, 897 (1993). There are many who dispute even that premise and argue, as the did defendants successfully in *United States v. Stringfellow*, 661 F.Supp. 1053 (C.D. Cal. 1987), under common law notions of fault that it was not their waste that was the operative cause of the problem, but the government's mismanagement of a site which it designated as appropriate for their use.

problem but escaped responsibility for their fair share of liability.

Courts are beginning to recognize that the government has used the threat of utterly fortuitous CERCLA liability as a means of transferring governmental authority to private parties--the very defendants who were major causes of the problem. *See, e.g., United States v. Anderson Greenwood & Co.*, 1996 LEXIS 6206 at *28-29 (S.D. Tex. April 10, 1996). One court has described EPA as "willing to sacrifice justice in favor of expediency" and condemned its conduct as agency "duplicity" because it simply rubber stamped the determinations of those defendants comprising the Site Committee. *Id.* at *15-16, *32. That court could have been describing what happened in this case. The Government had settled with those defendants whose waste actually contained the substances at which the response action was directed for far less than the remediation costs. The Third Circuit itself acknowledged in *Alcan-Butler I* the disproportionate amount of liability being imposed on Alcan and the "strong-arm" tactics inherent in the process. *Alcan-Butler I*, 964 F.2d at 270 n.29; *see also United States v. Knote*, 818 F.Supp. 1280, 1282-1284 (E.D. Mo. 1993) ("EPA's . . . vigorous protection of the environment does not make it an administrative deity . . . [with] unfettered authority to deceive and bully people into submission.").

Holding that a potentially responsible party can become jointly and severally liable for all remediation costs at a site simply because its waste is there--even though there is no causal connection between that waste and the chemicals that created the need for a response action--is not only inconsistent with common sense notions of how liability must be imposed in our legal system, it is, as Judge Keeton held in *Acushnet I*, in

conflict with the explicit language of CERCLA. To go further, as the *Alcan-Butler II* panel did, and effectively hold that this liability can only be avoided if one can establish some platonic ideal of environmental goodness, does not merely deprive those who are innocent of any remedy, but also supports the notion that the EPA have "unfettered authority to deceive and bully people into submission." *Knote*, 818 F. Supp. at 1284.

B. This Court Should Grant Alcan's Petition For Certiorari Because The Construction Given Section 107(a) of CERCLA By The Court Below Renders The Statute Void For Vagueness And Violates The Due Process Clause Of The United States Constitution Because Such Construction Provides No Rational Basis For Distinguishing Between Potential Responsible Parties Who May Be Held Liable And Those Who May Not.

Statutes are void for vagueness if they do not give fair and accurate warning of the actions which subject one to liability. *See Smith v. Goguen*, 415 U.S. 566, 572 (1974). A statute which includes virtually everything under its regulatory framework and fails to provide reasonable notice as to what is and what is not included under its regulation is unconstitutionally vague and therefore void. *See, e.g., Brockert v. Skormika*, 711 F.2d 1376 (7th Cir. 1983). The Third Circuit's construction of § 101(14) of CERCLA suffers from this deficiency, as is illustrated by comparing the facts in *Acushnet I*, where the district court found no liability, and this case, where Alcan was held jointly and severally liable.

Under the Third Circuit's construction, the imposition of liability is virtually random. There is no way of making a rational distinction between the result

that NETT escaped liability and the result that Alcan is liable for a lion's share of the entire remediation. Under the current state of CERCLA liability law, liability could extend from liability for the whole site to none at all on precisely the same facts, depending on which court a particular case is assigned to.

C. This Court Should Grant Certiorari Because The Decision By The *Alcan-Butler II* Panel To Uphold CERCLA Liability When The Hazardous Substances That Triggered Liability Are Irrelevant To The Response Action Is An Exercise Of Legislative Power And Effectively Amends The Statute To Delete The Definition Of Hazardous Substances; It Violates Article III Of The Constitution Defining The Separation Of Powers.

Although the court in *Alcan-Butler I* came close to rendering the definitional section of CERCLA meaningless by expanding its meaning to potentially include everything in the universe, it retained an important element by eliminating liability in situations where it was established that the hazardous substances did not contribute to the response costs. Under this logic, only the hazardous substances bearing some relationship to response costs became the basis for liability. Once the hazardous substances (trace metals) were proven to be irrelevant to the problems at the site, the remaining constituents of the Emulsion (water and mineral oil) were irrelevant to the CERCLA liability scheme. Congress' clear intention to exclude certain materials such as water and mineral oil from the scope of liability still had meaning. Excessive water can be environmentally detrimental--we know that many hardwood trees die in flooded areas.

Clearly, CERCLA was not intended to respond to environmental problems created solely by water.

However, the decision by the *Alcan-Butler II* panel affirming the application of the "environmentally harmless" standard eviscerates the meaning of the definition. Though the district court found the undisputed facts to be that the Trace Metals that triggered CERCLA liability in the first instance were wholly irrelevant to the problems at the site (as were the remaining constituents of the emulsion), nonetheless the district court held that joint and several liability applied because Alcan had not shown that water and mineral oil--substances *clearly outside* the CERCLA definition--were harmless.

Since nothing is always harmless liability can never be avoided. Since everything in the universe is captured by the definition, then CERCLA liability applies to everything. The court has simply amended the statute to delete the word "hazardous" from the legislated definition. As a practical matter, notwithstanding the district court's attempts to characterize what it did as statutory interpretation, it has simply substituted its judgment for that of Congress as to how to apply the liability scheme. The district court and the *Alcan-Butler II* panel have determined to apply joint and several liability to everyone whose waste reaches a site regardless or whether or not that waste is related to the environmental problems to which CERCLA is responding. This is the economic equivalent of imposing a remediation tax on former disposers. In doing so, the *Alcan Butler II* panel and the district court have overstepped their judicial authority, violated the principle of separation of powers, and usurped legislative prerogative. Courts are ill equipped to make the complex decisions and balance

or even identify the numerous issues involved in forming the policy behind CERCLA applicability. This Court should exercise its power to review this case to insure that courts limit themselves to activities to which their institution is suited and to which the Constitution relegates them.

D. The Court Should Grant Certiorari Since The Court Of Appeals Failed To Acknowledge The Legal Standard Articulated By This Court In *Landgraf v. USI Film Products* On The Issue of Retroactivity

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court attempted to eliminate confusion in the lower courts with respect to the presumption against retroactivity. The Court stated that the strong presumption against retroactivity applied absent clear evidence that Congress intended a statute be applied retroactively. *Id.* at 262. The Court rejected virtually every form of extrinsic evidence as satisfying the "clear congressional intent" requirement, including arguments based on verb tense, negative inference and legislative history. *Id.* at 248-251.

In *United States v. Olin Corp.*, 927 F.Supp. 1502 (S.D. Al. 1996), a case presently on appeal in the Eleventh Circuit, the district court applied the *Landgraf* test and concluded that CERCLA's confused legislative history, verb tenses and negative inferences were insufficient to rebut the strong presumption against retroactive application of legislation.

Alcan-Butler presents a more compelling case than *Olin* for this Court to evaluate the fairness of the retroactive application of CERCLA. Unlike *Olin*, the problems in this case did not arise on Alcan's property.

Instead, Alcan paid to have the oil in its Emulsion properly recovered and recycled by a state licensed recycler. However, unbeknownst to Alcan, the recycler elected to dispose of the Emulsion and other wastes in Butler Tunnel rather than to properly recycle the oil. In addition, unlike Olin which was held liable for its own waste on its own site, Alcan is being held liable for problems caused by other defendants' wastes in an area far removed from Alcan's property. Whereas Olin may be subject to nuisance liability, there is absolutely no basis upon which liability could be imposed on Alcan absent CERCLA. Moreover, Alcan is being held liable for environmental problems that are wholly unrelated to the nature of its waste. Simply put, Alcan is being held fully responsible for problems caused by third parties at a remote location years after Alcan had concluded an entirely legal, governmentally sanctioned transaction.

Alcan's motion to dismiss in *Alcan-Butler II* challenged the subject matter jurisdiction of the court below, inasmuch as it was predicated exclusively on CERCLA. Simultaneously, the *Olin* case was being appealed to the Court of Appeals for the Eleventh Circuit by the Government, which sought an expedited hearing and stated in its moving papers that Alcan's motion to dismiss in *Alcan-Butler* was in large part responsible for the request. Olin's position on appeal was widely supported by numerous amici, including a number of present and former members of Congress. The importance of the proper resolution of the CERCLA retroactivity issue could not be reasonably ignored. Yet, the Third Circuit chose to do just that. The court would not dismiss the case, nor could it plausibly claim that Alcan's motion was meritless, so it simply ignored it.

Courts which have held that CERCLA is retroactive subsequent to *Olin* have relied upon inconsistent

rationales. This lack of consistency suggests that their stated rationales are not the real reasons for the courts' actions. By refusing to follow this Court's directive in *Landgraf* and continuing to apply CERCLA retroactively, the courts are trying to accomplish what Congress could not. If Congress had explicitly stated that it intended for the statute to apply retroactively, CERCLA probably would never have become law. The Third Circuit's failure to even address Alcan's motion to dismiss suggests that it is unwilling to follow this Court's directive in *Landgraf*, at least as it applies to CERCLA.

This suspicion has been confirmed by recent comments of a Special Master. Alcan filed a similar motion on the issue of retroactivity in another pending Superfund case, *United States v. Stringfellow*, Case No. CIV-83-2501 JMI (Mx), United States District Court for the Central District of California. The Special Master has issued a tentative ruling to deny the motion. Comments made at the hearing by the Special Master confirm the suspicion that lower courts are simply refusing to comply with this Court's directive. The Special Master acknowledged what is already common knowledge--Superfund would not have passed if the statute was to be applied retroactively:

> THE COURT: You know, you're touching on exactly what the Supreme Court didn't want to comment on, is that in order to get legislation passed --
>
> MR. MULLIKEN: Yes.
>
> THE COURT: -- and get it by the public --
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> MR. MULLIKEN: Yes.
>
> THE COURT: -- they can't say what they're doing; so they have to drop the term [retroactivity] in order to get it signed.

MR. MULLIKEN: Yes.

THE COURT: Because if there term [retroactively] is in there, it will never pass muster. But then what the courts have been doing is, being realistic, knowing Congress is doing that, what did Congress intend? And they look at these things.

Now we're going to throw out legislative [history] and the Supreme Court wants the courts to throw out legislative history, purpose and [on] down the line?

MR. MULLIKEN: Yes.

THE COURT: None of them count in determining what the statute means. Do they [the Supreme Court] really mean that?

* * *

Congress doesn't put legal labels on the things they're doing because the public won't digest it. It's like Medicare, what they're doing to Medicare. I mean, they have thousands of people scared about it and it's ludicrous; so the courts have to be realistic when they're looking there.

* * *

MR SALIBRA: Now, you asked the question, let me answer it directly. . . . If Congress, for political reasons, doesn't want to make a decision, then the decision doesn't get made and it doesn't get made by the courts. Now that's not a novel notion. For a long time the Courts have expressed the notion that we are not going to legislate for the Congress. It is their job and it is our job to do something different.

United States v. Stringfellow, Transcript of Proceedings dated 11/13/96 pp.61-63, 71. *See* A-108. The lower courts are attempting to accomplish what they believe Congress *should have done* but found it politically impossible to do. Sadly, these courts believe that they know better than the public and are willing to impose their will under the guise of statutory interpretation.

In announcing *Landgraf*, this Court declared that under our legal system, retroactive liability is repugnant. It cautioned courts about the certainty of Congressional intent required before such an interpretation can be placed on a statute that is silent on that issue. The lower courts have paid lipservice to *Landgraf* at best and have ignored it at worst.

CONCLUSION

For all of the foregoing reasons, Petitioner Alcan Aluminum Corporation respectfully requests that this Honorable Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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Alcan Aluminum Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
Plaintiff	:	CIVIL NO. 89-1657
	:	(Judge Kosik)
vs.	:	
	:	
ALCAN ALUMINUM CORPORATION	:	
	:	
Defendant	:	

MEMORANDUM

Currently pending before the court is a motion for summary judgment filed by the plaintiff and a cross-motion for summary judgment filed by the defendant. After appropriate briefing by the parties, this matter is now ripe for disposition.

On April 12, 1991, United States Magistrate Judge Raymond J. Durkin filed a report in which he recommended that the plaintiff's motion for summary judgment be granted and that the defendant's cross-motion for summary judgment be denied. On April 25, 1991, the defendant filed objections to the Magistrate Judge's report.

When objections are filed to a Magistrate Judge's report, we must make a de novo determination of those portions of the report to which the objections are made. In so doing, we may accept, reject or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. §636(b)(1); Local Rule 904.2.

We have reviewed the report of the Magistrate Judge in light of the defendant's objections, and we find said report to be without error. In his report, the Magistrate Judge concluded that the plaintiff is entitled to summary judgment on the basis of the recent decision in United States v. Alcan Aluminum Corp., Civil No. 87-920 (N.D.N.Y. January 15, 1991). The Magistrate Judge concluded that the Alcan waste emulsion at issue in the above case was the same kind of waste emulsion at issue in the instant case, and further concluded that the court's opinion addressed the relevant legal issues presented in the instant case. As a result, the Magistrate Judge concluded that the court's decision in the Northern District of New York case should be applied to the instant case and is dispositive of the motions presented in this action in favor of the plaintiff.

The defendant agrees that the legal issues presented in the Northern District of New York case are similar to those presented here. The sole basis for the defendant's objections to the Magistrate Judge's report is the defendant's assertion that the decision in United States v. Alcan, supra, was erroneously decided. We disagree. We find the reasoning contained in the Northern District of New York case to be persuasive, and we find said case to be dispositive of the issues presented here.

Accordingly, we shall adopt the report of the Magistrate Judge over the objections of the defendant. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
Plaintiff	:	CIVIL NO. 89-1657
	:	(Judge Kosik)
vs.	:	
	:	
ALCAN ALUMINUM CORPORATION	:	
	:	
Defendant	:	

ORDER

AND NOW, this 8th day of May, 1991, IT IS HEREBY ORDERED THAT:

[1] the Magistrate Judge's April 12, 1991 report is adopted;

[2] the plaintiff's motion for summary judgment is granted;

(3] the defendant's cross-motion for summary judgment is denied;

[4] judgment is entered in favor of the plaintiff in the amount of $473,790.18; and

(5] the Clerk of Court is directed to close this case and forward a copy of this Memorandum and Order to United States Magistrate Judge Raymond J. Durkin.

/S/ Edwin M. Kosik
United States District Judge

964 F.2d 252

UNITED STATES of America

v.

ALCAN ALUMINUM CORP., BASF Corp.; Beazer Materials and Services, Inc.; Borg-Warner Corp.; Carrier Corp.; Chemical Leaman Tank Lines, Inc.; Chemical Management, Inc.; Chrysler Motors Corp.; Dana Corp.; Dart Industries, Inc.; Exxon Corp.; Ford Motor Company; Goulds Pumps, Inc.; Hitchcock Gas Engine Company, Inc.; Ingersoll-Rand; Neapco, Inc.; Rome Strip Steel Co., Inc.; the Stanley Works, Inc.; TRW, Inc.; United Technologies Chemical Management, Inc., Counter-claimant.

CHEMICAL MANAGEMENT, INC. Cross-claimant,

v.

UNITED STATES of America Counter-defendant, Alcan Aluminum Corp.; BASF Corp.; Beazer Materials and Services, Inc.; Borg-Warner Corp.; Carrier Corp.; Chemical Leaman Tank Lines, Inc.; Chrysler Motors Corp.; Dana Corp.; Dart Industries, Inc.; Exxon Corp.; Ford Motor Company; Goulds Pumps, Inc.; Hitchcock Gas Engine Company, Inc.; Ingersoll-Rand; Neapco, Inc.; Rome Strip Steel Co., Inc.; the Stanley Works, Inc.; TRW, Inc. UNITED TECHNOLOGIES; Cross-defendants, Neapco, Inc.; Counter-claimant. Neapco, Inc.; Cross-claimant,

v.

UNITED STATES of America, Counter-defendant, Alcan Aluminum Corp.; Basf Corp.; Beazer Materials and Services, Inc.; Borg-Warner Corp.; Carrier Corp.; Chemical Leaman Tank Lines, Inc.; Chemical Management, Inc.; Chrysler Motors Corp.; Dana Corp.; Dart Industries, Inc.; Exxon Corp.; Ford Motor Company; Goulds Pumps, Inc.; Hitchcock Gas Engine Company, Inc.; Ingersoll-Rand; Rome Strip Steel Co.; Inc.; the Stanley Works, Inc.; TRW, Inc.; United Technologies Cross-defendants,

Alcan Aluminum Corporation, Appellant.

No. 91-5481.
United States Court of Appeals,
Third Circuit.
Argued April 6, 1992.
Decided May 14, 1992.
Rehearing and Rehearing In Banc
Denied July 27, 1992.

***254** Lawrence A. Salibra, II (argued), Cleveland, Ohio, for appellant Alcan Aluminum Corp.

Barry M. Hartman, Acting Asst. Atty. Gen., Michael D. McIntyre, J. Carol Williams, Elizabeth Ann Peterson, John T. Stahr (argued), Attys., U.S. Dept. of Justice, Washington, D.C., for appellee U.S.

Norman W. Bernstein (argued), David L. Anderson, Laurel A. Bedig, Shea & Gould, Washington, D.C., for appellees BASF Corp., Beazer Materials and Services, Inc., Exxon Corp., and Ford Motor Co.

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John B. Lewis, Arter & Hadden, Cleveland, Ohio, for amici curiae Operation Oswego County, Inc., County of Oswego, Greater Oswego Chamber of Commerce, Inc., City of Oswego, Mohawk Cent. School Dist., Richfield Springs Cent. School Dist., Mount Markham Cent. School Dist., and New Hartford Cent. School Dist.

Hosmer Culkin, Operation Oswego County, Inc., Oswego, N.Y., for amicus curiae Operation Oswego County, Inc.

Bruce N. Clark, Oswego, N.Y., for amicus curiae County of Oswego.

***255** Michael Stanley, Oswego, N.Y., for amicus curiae Greater Oswego Chamber of Commerce, Inc.

Gay Williams, Sullivan & Williams, Oswego, N.Y., for amicus curiae City of Oswego.

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James R. Griffith, Felt, Hubbard, & Bogan, Utica, N.Y., for amici curiae Russell Blackstone, Feminine Touch Fabrics, Clinton Auto Ser., True Value Hardware, Brandy Keg Kennels, and Herkimer Elks Club.

Constantine L. Trela, Laura L. Leonard, Carolyn K. Gerwin, Sidley & Austin, Chicago, Ill., Robin S. Conrad, National Chamber Litigation Center, Inc., Washington, D.C., for amicus curiae U.S. Chamber of Commerce.

Before: GREENBERG and SCIRICA, Circuit Judges, and DEBEVOISE, District Judge. (FN*)

OPINION OF THE COURT

GREENBERG, Circuit Judge.

This matter is before the court on appeal by Alcan Aluminum Corporation ("Alcan") from a summary judgment entered in favor of the United States (the "Government") for response costs incurred by the Government in cleaning the Susquehanna River.

On November 24, 1989, the Government filed a complaint in the United States District Court for the

Middle District of Pennsylvania under section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(a) ("CERCLA") against 20 defendants, including Alcan, for the recovery of clean-up costs it incurred in response to a release of hazardous substances into the Susquehanna River. On October 11, 1990, the Government moved for summary judgment against Alcan, the only non-settling defendant, and on November 13, 1990, Alcan cross-moved for summary judgment.

The district court, after receiving a report and recommendation from a magistrate judge, issued a memorandum and order granting the Government's motion for the reasons set forth in United States v. Alcan Aluminum Corp., 755 F.Supp. 531 (N.D.N.Y. 1991) (hereinafter called "Alcan New York"), another CERCLA case involving the release of hazardous substances generated by Alcan but at a different location. Accordingly, on May 8, 1991, the court entered judgment against Alcan in the amount of $473,790.18, which was the difference between the full response costs the Government had incurred in cleaning the Susquehanna River and the amount the Government had recovered from the settling defendants.

For reasons that follow, even though we largely agree with the district court's interpretation of the relevant provisions of CERCLA, we will vacate the judgment of May 8, 1991, and will remand the case for further factual development concerning the scope of Alcan's liability.

I.

FACTS AND PROCEDURAL HISTORY

Virtually all of the facts in this case to the extent developed at this point are undisputed. The Butler Tunnel Site (the "Site") is listed on the National Priorities List established by the Environmental Protection Agency ("EPA") under section 105 of CERCLA, 42 U.S.C. § 9605. *See* 52 Fed.Reg. 27,620 (July 22, 1987). The Site includes a network of approximately five square miles of deep underground mines and related tunnels, caverns, pools and waterways bordering the east bank of the Susquehanna River in Pittston, Pennsylvania. The mine workings at the Site are drained by the Butler Tunnel (the "Tunnel"), a 7500 foot tunnel which feeds directly into the Susquehanna River.

***256** The mines are accessible from the surface by numerous air shafts or boreholes. One borehole (the "Borehole") is located on the premises of Hi-Way Auto Service, an automobile fuel and repair station situated above the Tunnel. The Borehole leads directly into the mine workings at the Site.

In the late 1970's, the owner of Hi-Way Auto Service permitted various liquid waste transport companies, including those owned and controlled by Russell Mahler (the "Mahler Companies"), to deposit oily liquid wastes containing hazardous substances into the Borehole. (FN1) The Mahler Companies collected the liquid wastes from numerous industrial facilities located in the northeastern United States and, in total, disposed of approximately 2,000,000 gallons of oily wastes containing hazardous substances through the Borehole. (FN2) Apparently, it was contemplated that the waste would remain at the Site indefinitely.

Alcan is an Ohio corporation which manufactures

aluminum sheet and plate products in Oswego, New York. From 1965 through at least 1989, Alcan's manufacturing process involved the hot-rolling of aluminum ingots. To keep the rolls cool and lubricated during the hot-rolling process, Alcan circulated an emulsion through the rolls, consisting of 95% deionized water and 5% mineral oil. At the end of the hot-rolling process, Alcan removed the used emulsion and replaced it with unused emulsion.

During the rolling process, fragments of the aluminum ingots, which also contained copper, chromium, cadmium, lead and zinc, hazardous substances under CERCLA, broke off into the emulsion. In an effort to remove those fragments, Alcan then filtered the used emulsion prior to disposing of it, but the filtering process was imperfect and hence some fragments remained. According to Alcan, however, the level of these compounds in the post-filtered, used emulsion was "far below the EP toxic or TCLP toxic levels and, indeed, orders of magnitude below ambient or naturally occurring background levels. Moreover, the trace quantities of metal compounds in the emulsion [were] immobile...." Appellant's Br. at 4. The Government does not specifically challenge Alcan's assertion that the used emulsion contained only low levels of these metallic compounds, as it contends that this fact is irrelevant to Alcan's liability under CERCLA.

From mid-1978 to late 1979, Alcan contracted with the Mahler Companies to dispose of at least 2,300,950 gallons of used emulsion from its Oswego, New York, facility. During that period, the Mahler Companies disposed of approximately 32,500-37,500 gallons (or five 6500-7500 gallon loads) of Alcan's liquid waste through the Borehole into the Site. (FN3)

In September 1985, approximately 100,000 gallons of water contaminated with hazardous substances were released from the Site into the Susquehanna River. It appears that this discharge was composed of the wastes deposited into the Borehole in the late 1970s. Between September 28, 1985, and January 7, 1987, EPA incurred significant response costs due to the release and the threatened release of hazardous substances from the Site. According to the Government, EPA's response actions included "containing an oily material on the river through the use of absorbent booms; immediately removing and disposing of 161,000 pounds (over 80 tons) of oil and chemical-soaked debris and soil, monitoring, sampling and analysis of air and water, *257 and co ducting hydrogeologic studies." Government's Br. at 10-11.

On December 27, 1985, EPA issued written information requests to potentially responsible parties ("PRPs"), (FN4) including Alcan, concerning their responsibility for the presence of hazardous substances at the Site. In May and June of 1986, EPA issued letters to the PRPs informing them of their potential liability under CERCLA. Those letters invited the PRPs to conduct a remedial investigation/feasibility study and to enter into an agreement with EPA for the issuance of an administrative order governing the study. Several PRPs conducted these negotiations with EPA in an attempt to settle their liability for removal costs incurred by the Government, but Alcan did not participate in this process.

In November 1989, the Government filed a complaint against 20 defendants, including Alcan, for the recovery of costs incurred as a result of the release of hazardous wastes from the Site into the Susquehanna River. In response, 17 of the 20

defendants executed a consent decree, reimbursing the Government for certain removal costs, and the district court entered that decree on January 17, 1990. On June 8, 1990, two of the three remaining defendants entered into a second consent decree with the Government, which the district court approved on July 25, 1990.

The Government then moved for summary judgment against Alcan, the only non-settling defendant, to collect the balance of its response costs. Alcan cross-moved for summary judgment, arguing that its emulsion did not constitute a "hazardous substance" as defined by CERCLA due to its below-ambient levels of copper, cadmium, chromium, lead and zinc, and further contending that its emulsion could not have caused the release or any response costs incurred by the Government.

On January 9, 1991, the district court referred this case to a magistrate judge who recommended that the court grant the Government's motion for summary judgment for the reasons set forth by the United States District Court for the Northern District of New York in *Alcan New York*. On the basis of that recommendation, the district court granted the Government's motion for summary judgment on May 8, 1991. Accordingly, it held that Alcan was jointly and severally liable for the removal costs because Alcan's waste contained identifiable levels of hazardous substances and was present at the Site from which there was a release. By following *Alcan New York*, the court also concluded that Alcan's waste did not fall within the "petroleum exclusion" under 42 U.S.C. § 9601(14).

Alcan filed a timely notice of appeal on June 5, 1991, and we have jurisdiction to review the district

court's final order pursuant to 28 U.S.C. § 1291. Our standard of review is plenary. *Carlson v. Arnot-Ogden Memorial Hospital,* 918 F.2d 411, 413 (3d Cir.1990).

II.

DISCUSSION

A. CERCLA FRAMEWORK

[1] In response to widespread concern over the improper disposal of hazardous ***258** wastes, Congress enacted CERCLA, a complex piece of legislation designed to force polluters to pay for costs associated with remedying their pollution. *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980,* Senate Committee of Environment and Public Works ("*A Legislative History*"), S.Doc. No. 97-14, 97th Cong., 2d Sess.1983, Vol. I, p. 320 (one of the statute's principal goals is "assuring that those who caused chemical harm bear the costs of that harm....") As numerous courts have observed, CERCLA is a remedial statute which should be construed liberally to effectuate its goals. *See, e.g., B.F. Goodrich v. Murtha,* 958 F.2d 1192, 1197 (2d Cir.1992) ("In CERCLA Congress enacted a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threaten[ ] the environment and human health."); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* 889 F.2d 1146, 1150 (1st Cir.1989) (CERCLA is a "broad response and reimbursement statute"). (FN5)

CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986), grants broad authority to the executive branch of the federal

government to provide for the clean-up of hazardous substance sites. Specifically, section 104 authorizes the President to respond to a release or substantial threat of a release of hazardous substances into the environment by: (1) removing or arranging for the removal of hazardous substances; (2) providing for remedial action relating to such hazardous substances; and (3) taking any other response measure consistent with the National Contingency Plan that the President deems necessary to protect the public health or welfare or the environment. 42 U.S.C. § 9604(a). The President has delegated most of his authority under CERCLA to EPA. (FN6)

CERCLA's bite lies in its requirement that responsible parties pay for actions undertaken pursuant to section 104. Under section 107, CERCLA liability is imposed where the plaintiff establishes the following four elements:

> (1) the defendant falls within one of the four categories of "responsible parties"; (FN7)
>
> (2) the hazardous substances are disposed at a "facility"; (FN8)
>
> (3) there is a "release" or threatened release of hazardous substances from the facility into the environment; (FN9)
>
> ***259** (4) the release causes the incurrence of "response costs". (FN10)

42 U.S.C. § 9607. *See also B.F. Goodrich,* at 1198; *United States v. Serafini,* 750 F.Supp. 168, 170 (M.D.Pa.1990); *United States v. Wade,* 577 F.Supp. 1326, 1333 (E.D.Pa.1983).

Reimbursement for response costs can be obtained in a variety of ways. For example, the Government can clean the sites itself using monies in the Hazardous Substance Response Trust Fund established by section 221 of CERCLA, 42 U.S.C. § 9631 and now the Hazardous Substance Superfund or "Superfund" (*see* 26 U.S.C. § 9507); EPA can then seek reimbursement from responsible parties, as it has done in this case. In addition, section 106(a) permits EPA to request the Attorney General to "secure such relief as may be necessary to abate such danger or threat" by filing a civil action in federal district court. That section also permits EPA to issue administrative orders "as may be necessary to protect public health and welfare and the environment."

Finally, and of great significance in this case, CERCLA imposes strict liability on responsible parties. 42 U.S.C. § 9601(32). (FN11) *See Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d at 1150; *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir.1985) ("Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise....")

B. CERCLA CONTAINS NO QUANTITATIVE REQUIREMENT IN ITS DEFINITION OF "HAZARDOUS SUBSTANCE"

[2] Alcan argues that it should not be held liable for response costs incurred by the Government in cleaning the Susquehanna River because the level of hazardous substances in its emulsion was below that which naturally occurs and thus could not have contributed to the environmental injury. It asserts that we must read a threshold concentration requirement into the definition

of "hazardous substances" for the term "hazardous" to have any meaning. The United States Chamber of Commerce (the "Chamber") as *amicus curiae* agrees, observing that "Congress took pains to define 'hazardous substance'.... Congress clearly never intended to abandon altogether the requirement that the substance at issue be hazardous." Chamber Br. at 20-21 (footnote omitted). The Chamber further states that "the uncontested facts show that Alcan's waste contained less of these [hazardous] elements than can be found in clean dirt." Chamber Br. at 18. For these reasons it too claims that Alcan should not be held liable for any environmental injury to the Susquehanna River.

The Government responds that under a plain reading of the statute, there is no quantitative requirement in the definition of "hazardous substance." Therefore, the Government asserts that Alcan's argument that substances containing below-ambient levels of hazardous substances are not really "hazardous" is properly directed at Congress, not the judiciary.

By adopting the reasoning of *Alcan New York*, the district court in this case agreed with the Government. Quoting *Amoco Oil* ***260** *Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir.1989), the district court in *Alcan New York* observed, " 'the plain statutory language fails to impose any quantitative requirement on the term hazardous substance,' " 755 F.Supp. at 537, and concluded that "there is no principled basis upon which to deviate from the ... rule that the mere listing of a substance by EPA renders that substance hazardous." *Id.* at 537-38. In response to Alcan's argument that virtually everything in the universe would constitute a hazardous substance under this reading of the statute, the court in *Alcan New York* held:

> [T]he corporate generator, a non-natural person, has added to what nature has already seen fit to provide for the continued existence of various life forms on this planet; that Congress has enacted laws to limit, and perhaps limit quite severely, additions to nature for the sake of the environment and of life on this planet seems eminently reasonable.

Id. at 538.

For the reasons that follow, we are satisfied that the court was correct in that conclusion.

1. Plain Meaning

Section 9601(14) sets forth CERCLA's definition of "hazardous substance" as:

> 'hazardous substance' means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not

> otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph....

Hence, the statute does not, on its face, impose any quantitative requirement or concentration level on the definition of "hazardous substances." Rather, the substance under consideration must simply fall within one of the designated categories.

2. Legislative History

Since the statute is plain on its face, we need not resort to legislative history to uncover its meaning. *Sacred Heart Medical Center v. Sullivan*, 958 F.2d 537, 545 (3d Cir.1992); *Velis v. Kardanis*, 949 F.2d 78, 81 (3d Cir.1991). In any event, the legislative history is barren of any remarks directly revealing Congress' intent vis-a-vis a threshold requirement on the definition of hazardous substances. Significantly, however, the available legislative history of CERCLA *does* indicate that Congress created the statute to force all polluters to pay for their pollution. *A Legislative History*, Vol. I, p. 320. It is difficult to imagine that Congress intended to impose a quantitative requirement on the definition of hazardous substances and thereby permit a polluter to add to the total pollution but avoid liability because the amount of its own pollution was minimal.

3. Jurisprudence

In addition, courts that have addressed this issue have almost uniformly held that CERCLA liability does not depend on the existence of a threshold quantity of a hazardous substance. *See, e.g., Amoco Oil Co. v. Borden, Inc.*, 889 F.2d at 669 ("The plain statutory language fails to impose any quantitative requirement on the term

hazardous substance and we decline to imply that any is necessary."); (FN12) *Eagle-Picher* ****261*** *Industries, Inc. v. United States EPA,* 759 F.2d 922, 927 (D.C.Cir.1985) ("a substance is a 'hazardous substance' within the meaning of CERCLA if it qualifies under *any* of the several subparagraphs of section 101(14)") (emphasis in original); *City of New York v. Exxon Corp.,* 744 F.Supp. 474, 483 (S.D.N.Y.1990) ("liability under CERCLA attaches regardless of the concentration of the hazardous substances present in a defendant's waste so long as the defendant's waste and/or the contaminants in it are 'listed hazardous substances'...."); *United States v. Western Processing Co.,* 734 F.Supp. 930, 936 (W.D.Wash.1990) ("The concentration or amount of hazardous substance is irrelevant as the statutory definition contains no threshold requirement."); *United States v. Conservation Chemical Co.,* 619 F.Supp. 162, 238 (W.D.Mo.1985) ("A waste is a 'hazardous substance' under CERCLA if it contains substances listed as hazardous under any of the statutes referenced in CERCLA section 101(14) regardless of the volumes or concentration of those substances; presumably, if Congress intended the definition of hazardous substances to be contingent upon the presence of a certain amount or concentration of a hazardous substance, it would have so provided."); *United States v. Carolawn Co.,* 21 Envt.Rep. Cas. (BNA) 2124, 2126 (D.S.C.1984) (CERCLA "simply does not distinguish hazardous substances on the basis of quantity of concentration") (footnote omitted); *United States v. Wade,* 577 F.Supp. 1326, 1340 (E.D.Pa.1983) (CERCLA imposes no concentration requirement on the definition of hazardous substances). *But see United States v. Ottati & Goss, Inc.,* 22 E.R.C. 1736, 1739 (D.N.H.1984) (granting defendant's motion to dismiss on the ground that it "did not cause or contribute to cause the disposal of any hazardous wastes ... which *exceeded the threshold*

established by the EPA for hazardous wastes") (emphasis supplied).

4. Congressional Matter

It may be that Congress did not intend such an all-encompassing definition of "hazardous substances," but this argument is best directed at Congress itself. If Congress had intended to impose a threshold requirement, it could easily have so indicated. We should not rewrite the statute simply because the definition of one of its terms is broad in scope. (FN13)

C. THE DISTRICT COURT'S DEFINITION OF "HAZARDOUS SUBSTANCE" IS NOT INCONSISTENT WITH EPA REGULATIONS AND POLICY

1. RQs and CASRNs

[3] Alcan asserts that the district court's decision is erroneous because it bases Alcan's liability on the ground that the used emulsion contains trace levels of certain generic compounds listed in 40 C.F.R. § 302.4, Table 302.4, which is a consolidation of the lists promulgated pursuant to the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act. (FN14) According to Alcan, substances listed under Table 302.4 must have reportable quantities ("RQs") (FN15) and Chemical Abstract ***262** Service Registry Numbers ("CASRNs") in order to be considered hazardous under CERCLA. Since Table 302.4 does not provide RQs or CASRNs for the generic compounds in Alcan's used emulsion, it is Alcan's view that they are therefore not "listed" hazardous substances under the meaning of *section* 302.4(a), 40 C.F.R. § 302.4(a). (FN16) The Government disagrees, and contends that the generic designations are not

mere headings inserted by the drafters of Table 302.4, but are substantive categories of hazardous substances that trigger CERCLA liability. In addition, the Government notes that CERCLA does not require a substance to have an RQ or a CASRN number to be considered hazardous. The district court, by adopting the reasoning in *Alcan New York*, properly endorsed the Government's position.

First, section 101(14) of CERCLA defines a hazardous substance to include "any toxic pollutant listed under section 1317(a) of Title 33 [the Clean Water Act]." 42 U.S.C. § 9601(14). The generic compounds contained in Alcan's emulsion *are* "listed" under 40 C.F.R. § 401.15, the list of toxic pollutants promulgated pursuant to section 1317(a). Thus, there is no need to reach the significance of RQs or CASRNs under Table 302.4 to determine whether generic compounds are "hazardous" by virtue of their listing under that Table.

Second, the fact that Table 302.4 does not provide CASRNs for generic categories is irrelevant, as CASRNs are "for convenience of the user only." 40 C.F.R. § 116.4. *Accord, City of New York v. Exxon*, 766 F.Supp. 177, 182 (S.D.N.Y.1991) ("the fact that the generic headings have no ... [CASRNs] assigned to them is of no significance"). Further, cadmium, chromium, lead and zinc *do* have CASRNs listed in the regulations. *See* 40 C.F.R. 302.4 Appendix A. It also appears that the absence of RQ numbers for generic categories is irrelevant to CERCLA liability. Indeed, EPA has explained why it decided not to establish RQs for the many broad generic classes of organic and metallic compounds designated as toxic pollutants under section 307(a) of the Clean Water Act:

It was recognized that to establish a single RQ for

> broad classes of hazardous substances would be inappropriate for many of the compounds within each class. Many of the generic classes of compounds encompass hundreds or even thousands of specific compounds. It would be virtually impossible for the Agency to develop a reportable quantity for a generic class of compounds that would take into account the varying characteristics of all of the specific compounds in the class.

50 Fed.Reg. 13,461.

EPA has further stated that generic categories of substances are nonetheless considered "hazardous substances":

> Several commentators were unsure of the Agency's position on reporting and liability for generic classes.... EPA has determined that the notification requirements need apply only to those specific compounds for which RQs are listed in Table 302.4, rather than to the generic classes of compounds. However, as the Agency indicated in the NPRM preamble, this does not preclude liability with respect to releases of specific compounds which are within one of these generic listings but which are not listed in Table 302.4. In other words, a releaser is liable for the cleanup of releases of hazardous substances which fall under any of the broad, generic classes, but does not have to report such releases when the specific compounds, and hence the RQs, are not listed in Table 302.4.

Id. at 13,461. (FN17)

[4] EPA's interpretation of the statute it is charged with enforcing is entitled to ***263** considerable deference, and must be adhered to where it is

reasonable and consistent with the language of the statute. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984); *see also Sacred Heart*, 958 F.2d at 543-45. Moreover, an EPA Administrator's interpretation of his own regulations is entitled to even greater deference. *Sacred Heart*, 958 F.2d at 543-45; *Vermont v. Thomas*, 850 F.2d 99, 102 (2d Cir.1988). For these reasons the district court, by adopting *Alcan New York*, correctly concluded that the absence of an RQ or CASRN number does not signify that the substance is not "hazardous." *Accord, City of New York v. Exxon Corp.*, 766 F.Supp. at 182. (FN18)

In sum, the only question before us in this regard is whether the substances Alcan *admits* existed in its used emulsion are listed in any of the statutory and regulatory schemes incorporated by section 101(14), 42 U.S.C. § 9601(14). Alcan has conceded that its emulsion contained trace quantities of cadmium, chromium, copper, lead and zinc. App. at 43. Those compounds are listed as hazardous under 40 C.F.R. § 401.15, promulgated pursuant to the Clean Water Act, 33 U.S.C. § 1317(a). Further, these compounds are "listed" under Table 302.4 because the absence of CASRN or RQ numbers is irrelevant. Hence, they are hazardous substances.

2. Section 302.4(b)

The foregoing determination that the generic compounds in Alcan's emulsion are "listed" under the meaning of section 302.4(a) (40 C.F.R. § 302.4(a)) also disposes of Alcan's contention that the district court erred in failing to determine whether the compounds exhibit the characteristics of hazardous substances pursuant to section 302.4(b). Section 302.4(b) provides:

> *Unlisted hazardous substances.* A solid waste, as defined in 40 CFR 261.2, which is not excluded from regulation as a hazardous waste under 40 CFR 261.4(b), is a hazardous substance under section 101(14) of the Act *if it exhibits any of the characteristics identified in 40 CFR 261.20 through 261.24.* (emphasis supplied).

However, because generic compounds *are* "listed" hazardous substances under Table 302.4, we need not determine whether they exhibit the characteristics set forth in 40 C.F.R. ss 261.20 through 261.24. In addition, as the district court observed, the compounds in Alcan's emulsion are hazardous by virtue of their designation as toxic pollutants under the Clean Water Act. (FN19)

3. May, Not Shall

Alcan also deems it significant that EPA has explained that "CERCLA liability *may* still attach to releases of specific compounds that are within one of the generic listings but not specifically listed in Table 302.4." 50 Fed.Reg. 13,472-73 (emphasis supplied). In Alcan's view, if EPA intended generic categories to constitute hazardous substances in every instance, it would have used the word "shall." However, as the court in *City of New York v. Exxon Corp.* pointed out, "[t]he use of the word 'may' simply reflects EPA's recognition that CERCLA liability attaches only if all elements of a CERCLA cause of action are established." 766 F.Supp. at 183 n. 1.

***264** 4. Environmental Policy

In Alcan's view, the district court's construction of the statute is at odds with environmental policy

because it imposes liability on generators of allegedly "hazardous" substances although the substances pose no real threat to the environment. (FN20) Alcan's argument, though superficially appealing, is flawed. First, as noted above, the Government responds to "releases" that threaten environmental safety. Thus, it is the *release alone* that must justify the response costs, not the particular waste generated by one given defendant. Here, there is no question but that a release occurred. Second, the fact that a single generator's waste would not in itself justify a response is irrelevant in the multi-generator context, as this would permit a generator to escape liability where the amount of harm it engendered to the environment was minimal, though it was significant when added to other generators' waste. Accordingly, we find that the district court's construction of the statute furthers important environmental goals. (FN21)

D. CAUSATION

[5] Alcan maintains that, if we decline to construe the determination of "hazardous substance" to encompass a concentration threshold, we must at least require the Government to prove that *Alcan's emulsion* caused or contributed to the release or the Government's incurrence of response costs. The Government contends, and the district court by adopting the reasoning of *Alcan New York* agreed, that the statute imposes no such causation requirement, but rather requires that the plaintiff in a CERCLA proceeding establish that the *release* or *threatened release* caused the incurrence of response costs; it underscores the difficulty CERCLA plaintiffs would face in the multi-generator context if required to trace the cause of the response costs to each responsible party. (FN22)

1. Plain Meaning

The plain meaning of the statute supports the Government's position. As noted above, section 107 imposes liability upon a generator of hazardous substances who contracts with another party to dispose of the hazardous substances at a facility "from which there is a *release, or threatened release which causes the incurrence of response costs.*" 42 U.S.C. § 9607 (emphasis supplied). The statute does not, on its face, require the plaintiff to prove that the generator's *hazardous substances* themselves caused the release or caused the incurrence of response costs; rather, it requires the plaintiff to prove that the *release or threatened release* caused the incurrence of response costs, and that the defendant is a generator of hazardous substances at the facility.

2. Legislative History

The legislative history also supports the Government's position that CERCLA does not require the plaintiff to establish a specific causal relationship between a generator's waste and the release or the plaintiff's incurrence of response costs. It appears that the early House of Representatives' version of CERCLA imposed liability ***265** upon those persons who "caused or contributed to the release or threatened release." H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(D), 126 Cong.Rec. 26,779. However, the version ultimately passed by Congress deleted the causation requirement and instead imposed liability upon a *class* of responsible persons without regard to whether the person specifically caused or contributed to the release and the resultant response costs. *See* 126 Cong.Rec. 31,981-82. Moreover, Congress added three limited defenses to liability based on causation which are contained in 42

U.S.C. § 9607(b): acts of God, acts of war, and acts or omissions of a contractually unrelated third party when the defendant exercised due care and took appropriate responses. Imputing a specific causation requirement would render these defenses superfluous.

In sum, the legislative history indicates that Congress considered and rejected a requirement that the plaintiff establish that the defendant's waste caused or contributed to the release or the incurrence of response costs.

3. Jurisprudence

Further, virtually every court that has considered this question has held that a CERCLA plaintiff need not establish a direct causal connection between the defendant's hazardous substances and the release or the plaintiff's incurrence of response costs. For example, in *New York v. Shore Realty Corp.*, the defendant, an owner of a facility, asked the Court of Appeals for the Second Circuit to read this "causation" requirement into section 107(a). The court declined that invitation and held, "section 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release without regard to causation." 759 F.2d at 1044 (footnote omitted). The court observed that "there are defenses for causation solely by an act of God, an act of war, or acts or omissions of a third party other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship with the defendant," *id.* at 1042, and it found that these defenses would be superfluous if the statute imposed a causation requirement. It concluded, "[w]ithout a clear congressional command otherwise, we will not construe a statute in any way that makes some of its provisions surplusage." *Id.* at 1044.

The court of appeals in *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989), extended *Shore Realty*'s analysis to generators of hazardous waste. The court of appeals there rejected a similar argument that the CERCLA plaintiff was required to establish that the waste the defendant generator sent to the facility caused or contributed to the environmental harm, observing that Congress deleted the causation language from CERCLA precisely because it was aware of the difficulties plaintiffs would confront in the multi-generator context if required to prove such a connection. It held, "[i]n deleting causation language from section 107(a), we assume as have many other courts, that Congress knew of the synergistic and migratory capacities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed waste to its source." *Id.* at 170 (footnote omitted).

Other cases are in accord. *See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d at 1152-54 (the only causation required under CERCLA is that the release or threatened release cause the response costs; plaintiff need not establish that the defendant's waste caused or contributed to the response costs); *United States v. Bliss*, 667 F.Supp. 1298, 1309 (E.D.Mo.1987) ("traditional tort notions, such as proximate cause, do not apply"); *United States v. Wade*, 577 F.Supp. at 1333 ("the release which results in the incurrence of response costs and liability need only be of 'a' hazardous substance and not necessarily one contained in the defendant's waste. The only required nexus between the defendant and the site is that the defendant have dumped his waste there and that the hazardous substances found in the defendant's waste are also found at the site.")

Despite Alcan's assertion, *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, is not to *266 the contrary. There, the Court of Appeals for the Fifth Circuit held that the plaintiff may not recover response costs unless the release posed a threat to the public or the environment. In the court's view, "the question of whether a release has caused the incurrence of response costs should rest upon a factual inquiry into the circumstances of a case and the relevant factual inquiry should focus on whether the particular hazard justified any response actions." *Id.* at 670. The court did not hold, as Alcan suggests, that the factual investigation would concern whether the *defendant's waste* caused the incurrence of response costs. Moreover, the environmental injury at issue in *Amoco* resulted from one generator's pollution, and the court expressly noted that other courts have concluded that, "in cases involving multiple sources of contamination, a plaintiff need not prove a specific causal link between costs incurred and an individual generator's waste." *Id.* at 670 n. 8. This distinction is significant for, in the single generator context, if the response costs were justified, the defendant necessarily caused the incurrence of those costs. However, in the multi-generator context, the fact that the response costs were justified would not *per force* signify that each generator's waste caused the release and the resultant response costs. *See also City of New York v. Exxon Corp.*, 766 F.Supp. at 194. (FN23)

Decisions rejecting a causation requirement between the defendant's waste and the release or the incurrence of response costs are well-reasoned, consistent with the plain language of the statute and consistent with the legislative history of CERCLA. Accordingly, we reject Alcan's argument that the Government must prove that Alcan's emulsion

deposited in the Borehole caused the release or caused the Government to incur response costs. Rather, the Government must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the *release* caused the incurrence of response costs.

E. PETROLEUM EXCLUSION

[6] Alcan further argues that its emulsion constitutes "petroleum" within the meaning of 42 U.S.C. § 9601 and is thus excluded from CERCLA liability. Section 9601(14) provides: "[t]he term [hazardous substance] does not include *petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph....*" (emphasis supplied). According to Alcan, EPA has interpreted the petroleum exclusion to extend to "used oil" containing concentrations of hazardous substances at levels equal to or less than that found in virgin oil. Alcan contends that its emulsion is "used oil" with concentration levels of cadmium, chromium, copper, lead and zinc that are lower than the levels of these compounds in virgin oil and therefore falls within the petroleum exclusion. Although this argument has superficial appeal, it cannot withstand close scrutiny.

First, and most importantly, EPA has distinguished between oil that naturally contains low levels of hazardous substances and oil to which hazardous substances have been added through use. Although EPA has extended the petroleum exclusion to the former category of oily substances, it has specifically declined to extend such protection to the latter category. In EPA's words: "EPA does not consider materials such as waste oil to which listed CERCLA

substances have been added to be within the petroleum exclusion." 50 Fed.Reg. 13,460 (1985). Thus, the conclusion of the district court in *Alcan New York* that "a plain reading of the 'exclusionary' provision does not warrant the inclusion of oil which has become contaminated with hazardous substances through use; rather what does come within the ambit of the 'petroleum exclusion' is the oil ***267** or oil fraction which naturally contains the hazardous substance(s) unless the fraction itself is specifically listed or designated as a hazardous substance," is in harmony with EPA's interpretation. 755 F.Supp. at 539. Moreover, EPA's interpretation of the petroleum exclusion comports with the relevant legislative history which indicates that the exclusion was intended for oil spills, not for releases of oil which has become infused with hazardous substances through use. *See* S.Rep. No. 848, 96th Cong., 2d Sess. 30-31 (1980), *reprinted in A Legislative History,* Vol. I, at 405.

Alcan has admitted that the hot-rolling process adds hazardous substances to the emulsion. Thus, it has effectively conceded that its emulsion does not fall within the scope of the petroleum exclusion as construed by EPA. (FN24)

F. DIVISIBILITY OF HARM

[7] The foregoing conclusions that (1) there is no quantitative threshold in the definition of hazardous substances and (2) the plaintiff need not establish a causal connection between a given defendant's waste and the release or the incurrence of response costs would initially appear to lead to unfair imposition of liability. As Alcan asserts, this definition of "hazardous substances" effectively renders everything in the universe hazardous, including, for example, federally approved drinking water. When this definition is read

in conjunction with the rule that specific causation is not required, CERCLA seemingly would impose liability on every generator of hazardous waste, although that generator could not, on its own, have caused any environmental harm. (FN25)

While Alcan's assertion is of considerable strength, the Government's rebuttal is equally forceful. It notes that individual defendants must be held responsible for environmental injury brought about by the actions of multiple defendants, even if no single defendant itself could have produced the harm, for otherwise "each defendant in a multi-defendant case could avoid liability by relying on the low concentrations of hazardous substances in its waste, while the plaintiff is left with the substantial clean-up costs associated with the defendant's accumulated wastes." Government's Br. at 32. The Government reasons that this strong public interest in forcing polluters in the multi-generator context to pay outweighs a defendant's interest in avoiding liability even if that defendant has not acted in an environmentally unsound fashion when its actions are viewed without regard to the actions of others. The court in *United States v. Western Processing Co.*, adopting the position advanced by the Government in this case, observed:

> it is entirely possible for a hazardous waste facility to be comprised of entirely small amounts from many contributors. If each PRP could make [Alcan's] argument, *i.e.*, that its particular contribution did not warrant remediation and thus that it should not be liable for any costs, *no* party would be liable, despite the fact ***268** that the site, as a whole, needed to be cleaned up and the government incurred costs in doing so.

734 F.Supp. at 937 (emphasis in original).

We find some merit in the arguments advanced by both the Government and Alcan. Accordingly, in our view, the common law principles of joint and several liability provide the only means to achieve the proper balance between Alcan's and the Government's conflicting interests and to infuse fairness into the statutory scheme without distorting its plain meaning or disregarding congressional intent.

CERCLA does not specifically provide for joint and several liability in a case involving multiple defendants. Further, both the House and Senate deleted provisions imposing joint and several liability from their respective versions of the statute before its enactment. However, as the court explained in *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 808 (S.D. Ohio 1983), at the conclusion of an exhaustive review of statements made by the legislation's sponsors concerning the deletion of joint and several liability,

> the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases. 126 Cong.Rec. at S14964, S15004, H11787, H11799, 126 Cong.Rec. H9465 (Sept. 23, 1980) (remarks of Rep. Madigan), H9466 (Remarks of Rep. Stockman). The deletion was not intended as a rejection of joint and several liability. 126 Cong.Rec. S14964, H11787, H11799 (Nov. 24, 1980). Rather, the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.

Other courts have agreed that Congress' deletion of joint and several liability from the final version of the statute signalled its intent to have the courts determine, in accordance with traditional common law principles, whether such liability is proper under the circumstances. *See, e.g., O'Neil v. Picillo,* 883 F.2d 176, 178 (1st Cir.1989), *cert. denied,* 493 U.S. 1071, 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990); *United States v. Monsanto Co.,* 858 F.2d at 171 n.3. *Accord, B.F. Goodrich,* 958 F.2d 1192, 1198 (2d Cir.1992). In determining whether the imposition of joint and several liability upon Alcan is proper, so that it may be held liable for the Government's full response costs less what had been recovered from the settling defendants, we turn to the Restatement (Second) of Torts for guidance. (FN26)

Section 433A of the Restatement provides that, when two or more joint tortfeasors acting independently cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the harm that the individual tortfeasor has caused. It states,

> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes.

Similarly, section 881 sets forth the affirmative defense based upon the divisibility of harm rule in

section 433A:

> If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.

However, where joint tortfeasors cause a single and indivisible harm for which there is no reasonable basis for division according ***269** to the contribution of each, each tortfeasor is subject to liability for the entire harm. Section 875 recites:

> Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.

Obviously, of critical importance in this analysis is whether a harm is divisible and reasonably capable of apportionment, or indivisible, thereby subjecting the tortfeasor to potentially far-reaching liability. (FN27)

Under the Restatement, where a joint tortfeasor seeks to apportion the full amount of a plaintiff's damages according to that tortfeasor's own contribution to the harm, it is the tortfeasor's burden to establish that the damages are capable of such apportionment. (FN28) As the comments concerning this issue explain, the burden of proving that the harm is capable of apportionment is placed on the tortfeasor to avoid:

> the injustice of allowing a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability merely because the harm which he has inflicted has combined with similar harm inflicted

> by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before is can be apportioned. In such a case the defendant may justly be required to assume the burden of producing that evidence, or if he is not able to do so, of bearing full responsibility. As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm should fall upon the former.

Comment on Section 433 B subsection (2).

These provisions underscore the intensely factual nature of the "divisibility" issue and thus highlight the district court's error in granting summary judgment for the full claim in favor of EPA without conducting a hearing. For this reason, we will remand this case for the court to determine whether there is a reasonable basis for limiting Alcan's liability based on its personal contribution to the harm to the Susquehanna River.

Our conclusions on this point are completely consistent with our previous discussion on causation, as there we were concerned with the Government's burden in demonstrating liability in the first instance. Here we are dealing with Alcan's effort to avoid liability otherwise established. We observe in this regard that Alcan's burden in attempting to prove the divisibility of harm to the Susquehanna River is substantial, and the analysis will be factually complex as it will require an assessment of the relative toxicity, migratory potential and synergistic capacity of the hazardous waste at issue. *United States v. Monsanto Co.*, 858 F.2d at 172 n. 26. *See also United States v. Chem-Dyne Corp.*, 572 F.Supp. at 811. But Alcan should be permitted this opportunity to limit or avoid liability. If Alcan succeeds in this endeavor, it should only be liable for that portion

of the harm fairly attributable to it. *Accord, United States v. Marisol, Inc.*, 725 F.Supp. 833, 843 (M.D.Pa.1989) ("the question of the relative contribution of a particular defendant to a waste site may impact upon the issue of joint and several liability").

Alcan maintains that there is no need for a hearing because, not only is the harm divisible, but its relative contribution to the ***270** injury to the Susquehanna River is zero. According to Alcan, "[i]t is technically impossible to have a release or threatened release such that a clean-up would be authorized or justified under the National Contingency Plan as a result of the addition of the metal compounds in the Alcan emulsion to the Butler Site. When one adds two materials that have the same concentrations of an element or compound, the net result is the *same* concentration. It can never result in a higher concentration." Appellant's Br. at 18 (emphasis in original). Alcan's Reply Brief similarly asserts that "below ambient levels of any substance can never cause or contribute to a release or response costs." Appellant's Reply Br. at 10-11.

[8] The district court did not specifically address this argument. Indeed, in light of their belief that *Alcan New York* was dispositive of the arguments advanced by Alcan in this case, neither the magistrate judge nor the district court engaged in any factual investigation concerning the divisibility of the environmental harm caused to the Susquehanna River as a result of the release of hazardous substances from the Borehole. However, we are not the proper forum to consider Alcan's argument as we have no way of determining whether the trace levels of metallic compounds in Alcan's used emulsion became concentrated and thereby posed an environmental threat. Furthermore, there may be other circumstances bearing on this issue of which we are not even aware. Thus, the district court

should re-evaluate Alcan's contention in light of the facts developed in the hearing on this issue. (FN29)

In sum, on remand, the district court must permit Alcan to attempt to prove that the harm is divisible and that the damages are capable of some reasonable apportionment. We note that the Government need not prove that Alcan's emulsion caused the release or the response costs. On the other hand, if Alcan proves that the emulsion did not or could not, *when mixed with other hazardous wastes,* contribute to the release and the resultant response costs, then Alcan should not be responsible for *any* response costs. In this sense, our result thus injects causation into the equation but, as we have already pointed out, places the burden of proof on the defendant instead of the plaintiff. We think that this result is consistent with the statutory scheme and yet recognizes that there must be some reason for the imposition of CERCLA liability. Our result seems particularly appropriate in light of the expansive ***271.** meaning of "hazardous substance." (FN30) Of course, if Alcan cannot prove that it should not be liable for any response costs or cannot prove that the harm is divisible and that the damages are capable of some reasonable apportionment, it will be liable for the full claim of $473,790.18.

III.

CONCLUSION

In conclusion, the district court correctly determined that CERCLA's definition of "hazardous substance" does not include a threshold requirement. This interpretation is fully consistent with the plain language of the statute, the legislative history, EPA regulations and EPA policy. In addition, the court correctly determined that a CERCLA plaintiff need not establish a causal connection

between a generator's hazardous substances and the release or the incurrence of response costs. The district court was also correct in determining that Alcan's used emulsion does not fall within the petroleum exclusion under 42 U.S.C. § 9601(14), and it properly rejected Alcan's constitutional challenges.

[9][10] However, we find that the court should have conducted a hearing to determine the divisibility of harm to the Susquehanna River, and will remand the case for the court to do so. If Alcan can establish in that hearing that the harm is capable of reasonable apportionment, then it should be held liable only for the response costs relating to that portion of harm to which it contributed. Further, if Alcan can establish that the hazardous substances in its emulsion could not, when added to other hazardous substances, have caused or contributed to the release or the resultant response costs, then it should not be liable for any of the response costs. Accordingly, we will vacate the judgment of the district court of May 8, 1991, and will remand the matter for further proceedings consistent with this opinion.

SUR PETITION FOR REHEARING

July 27, 1992.

PRESENT: SLOVITER, *Chief Judge*, and STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, NYGAARD, and ALITO, *Circuit Judges*, and DEBEVOISE, *District Judge*. (FN**)

The petition for rehearing filed by the appellee in the above captioned matter having been sumitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court

in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

FN* Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

FN1. The Mahler Companies are said to be government-licensed waste processors. *Amicus Curiae* the United States Chamber of Commerce Br. at 6.

FN2. On occasion, the Mahler Companies commingled Alcan's oily waste with other waste at Mahler's recycling facilities located in Syracuse, New York, and Edgewater, New Jersey, before disposing of the waste through the Borehole.

FN3. Although Alcan has argued that the Government did not prove that its emulsion was actually at the Site because it did not establish the presence of chromium, this does not preclude Alcan's liability under CERCLA, for even assuming *arguendo* that there was no chromium at the Site, Alcan has admitted that "the Mahler companies disposed of ... the Alcan emulsion through the Borehole into the Site." App. at 36. Alcan asserts that it was not aware that Mahler was disposing of the oily waste in this fashion, but the Government does not contend otherwise, and in any event Alcan does not contend that this should affect our result.

FN4. Under 42 U.S.C. § 9607(a), "responsible parties" include:

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, *from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance....*

(emphasis supplied).

As courts have observed, Congress intended that the underscored language relate not only to § 9607(a)(4), but also to § 9607(a)(1)-(3), but apparently misdrafted the language. *See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151 n. 4 (1st Cir.1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 n. 16 (2d Cir.1985).

***271** FN5. Unfortunately, CERCLA was passed in great haste during the waning days of the 96th Congress. As a result, the statute is riddled with

inconsistencies and redundancies. *See A Legislative History*, Vol. I, pp. 785-87.

FN6. *See, e.g.*, Exec. Order No. 12,580 (January 23, 1987).

FN7. *See supra* n. 4.

FN8. A facility is defined as:

> any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.
>
> 42 U.S.C. § 9601(a).
>
> The parties have agreed that the Site is a "facility" within the meaning of CERCLA.

FN9. A release is defined as:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such

persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.] if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

42 U.S.C. § 9601.

The parties in this suit have also agreed that a "release" has occurred.

FN10. Section 9601 provides that the terms "respond" and "response" mean "remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement actions related thereto." Typically, a "removal" action is an action intended to remove the hazardous waste from the area, whereas a "remedial" action involves a long-term effort to remedy the damaged environment. *See* Government's Br. at 4 n. 4.

FN11. That section provides that CERCLA liability "shall be construed to be the standard of liability" under section 311 of the Clean Water Act, 33 U.S.C. § 1321; section 1321 liability is strict. *See, e.g.,*

Steuart Transportation Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir.1979).

FN12. As we discuss below, the court of appeals in *Amoco* effectively built back into the statute a threshold requirement under the causation prong of liability in the single-generator context.

FN13. EPA's statement that it does not consider a waste to be "hazardous" for purposes of the Resource Conservation and Recovery Act ("RCRA") unless that waste exists in a form "capable of causing substantial harm if mismanaged," 57 Fed.Reg. 1, 12 (January 2, 1992), does not alter our conclusion. As we discuss *infra* at n.19, RCRA's goals differ from CERCLA's, and we do not construe EPA's comments as indicating that the Agency also imputes a threshold concentration requirement into the definition of hazardous substance under section 101(14) of CERCLA, especially in the face of plain statutory language indicating otherwise.

There is some force to Alcan's argument that this definition of "hazardous substances" is so broad that it encompasses virtually everything and thereby eviscerates the meaning of "hazardous." However, our holding with respect to divisibility of harm as discussed below should assuage Alcan's fear that liability under CERCLA will be as far-reaching as the definition of hazardous substances.

FN14. We agree with the district court in *Alcan New York* regarding the origin of the table.

***271** FN15. "Reportable quantity" is defined in EPA's regulations as "that quantity, as set forth in this part, the release of which requires notification pursuant to this part." 40 C.F.R. 302.3. Under 42

U.S.C. § 9603, the person in charge of a facility is required to notify EPA immediately of any release of a hazardous substance in a quantity equal to or exceeding the RQ for that substance.

FN16. Section 302.4(a) provides, "*Listed hazardous substances.* The elements and compounds and hazardous wastes appearing in Table 302.4 are designated as hazardous substances under section 102(a) of the Act."

FN17. It is also significant that Table 302.4 does not include a generic category for all related substances. Thus, EPA chose to deem hazardous only certain broad categories of substances, not all.

FN18. While reading the statute to include generic compounds within the meaning of hazardous substances leads to a duplicative listing of wastes containing generic compounds, this is not a fatal flaw and, moreover, is not the only place in which the statute is duplicative. This duplication stems from the fact that section 101(14) of CERCLA incorporates various statutory schemes and the regulatory lists promulgated pursuant to those statutes.

FN19. In any event, as the district court noted in *City of New York v. Exxon Corp.*, "the solubility test [pursuant to 40 C.F.R. § 261.20-261.24] is designed to determine the mobility of particular constituents in waste and their potential to contaminate groundwater after leaking from a landfill.... This particular concern--the protection of groundwater--addressed by the EP test is based upon RCRA's regulatory objectives, not on CERCLA's broad, remedial concern for releases into *any*

environmental media." 766 F.Supp. at 185 (emphasis in original). Thus we agree with the Government's contention that RCRA's goals differ from those of CERCLA.

FN20. As we discuss below, whether Alcan is correct that its emulsion poses no threat to the environment, even when added to other hazardous substances, should be thoroughly investigated on remand in the factual hearing concerning the divisibility of harm.

FN21. Alcan's argument that the district court's decision is inconsistent with prior EPA actions is without merit. The facts in this case are not identical to those in cases cited by Alcan where EPA did not seek to impose CERCLA liability. Further, it is far from clear that EPA took the action it did in those cases because it determined that materials containing only trace elements of listed hazardous substances were not hazardous under CERCLA.

Equally unavailing is Alcan's assertion that the district court's opinion conflicts with EPA's recently promulgated national policy concerning household waste. The fact that EPA has determined that liability should not be imposed on homeowners for household waste does not indicate that household waste is not hazardous, but rather evinces EPA's understanding that household waste *does* include hazardous substances, for otherwise there would be no need to create an exception. Obviously, there are significant policy reasons to exclude homeowners from CERCLA liability.

FN22. Of course, if the defendant is not a responsible party with respect to the facility, then it cannot be liable.

FN23. Alcan is correct that the court in *Louisiana-Pacific Corp. v. Asarco, Inc.*, 735 F.Supp. 358, 362 (W.D.Wash.1990), imposed the causation requirement that Alcan requests. The court there held: "liability does not attach because the defendant caused 'a release,' but because it caused 'response costs.'" With all due respect, we believe that the court reached its conclusion based on an incorrect analysis of *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, and *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, and we decline to follow it.

FN24. Alcan raises other challenges, but they are without merit. It asserts that the statute is impermissibly vague, but the district court by following *Alcan New York* correctly rejected that challenge because the statute provides fair notice of what is considered a CERCLA hazardous substance. Moreover, it has long been established that civil enactments are reviewed with greater leniency than criminal statutes. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982); *Kreimer v. Bureau of Police of Morristown*, 958 F.2d 1242, 1266-70 (3d Cir.1992), to be reported at 958 F.2d 1242. In addition, Alcan alleges that it has been subjected to unfair prosecution in violation of the equal protection clause, but it has not put forward any evidence to support that assertion. Thus, the district court's rejection of this claim was correct.

***271** FN25. Dean Prosser's hornbook highlights the paradox of liability where acts harmless in themselves together cause damage, observing:

> A very troublesome question arises where the acts of each of two or more parties, standing alone, would not be wrongful, but together they cause harm to the plaintiff. If several defendants independently pollute a stream, the impurities traceable to each may be negligible and harmless, but all together may render the water entirely unfit for use. The difficulty lies in the fact that each defendant alone would have committed no tort. There would have been no negligence, and no nuisance, since the individual use of the stream would have been a reasonable use, and no harm would have resulted. William L. Prosser, *Law of Torts*, § 52, at 322 (4th ed.1971).

FN26. By adhering to the rules set forth in the Restatement, we also further the interest in achieving uniformity in the articulation of federal common law that governs CERCLA's interstices. *Accord, United States v. Monsanto*, 858 F.2d at 171-72.

FN27. Interestingly, the drafters of the Restatement found that joint pollution of water is typically subject to the divisibility rule. They write:

> There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible.... *Such apportionment is commonly made in cases of private nuisance, where the pollution of a stream ... has interfered with the plaintiff's use and enjoyment of his land.*
>
> Section 433 A, Comment d (emphasis supplied). *See, e.g., Somerset Villa, Inc. v. Lee's Summit*, 436 S.W.2d 658 (Mo.1968).

FN28. Section 433 B(2) provides, "Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."

FN29. In this vein, we also reject the Government's argument that a hearing is unnecessary because Alcan has admitted that its emulsion was "commingled" with the other generators' waste: "commingled" waste is not synonymous with "indivisible" harm. We observe that some courts have held that a generator may present evidence that it has paid more than its "fair share" in a contribution proceeding, expressly permitted under 42 U.S.C. § 9613(f)(2). *See, e.g., United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir.1989) *cert. denied*, 494 U.S. 1057, 110 S.Ct. 1527, 108 L.Ed.2d 767 (1990); *United States v. Monsanto*, 858 F.2d at 173. In a sense, the "contribution" inquiry involves an analysis similar to the "divisibility" inquiry, as both focus on what harm the defendant caused. However, we believe that this inquiry, to the extent that it is the same as that discussed in above-noted cases, is best resolved at the initial liability phase and not at the contribution phase since it involves precisely relative degrees of *liability*. Thus, if the defendant can prove that the harm is divisible and that it only caused some portion of the injury, it should only be held liable for that amount. In our view, the logical consequence of delaying the apportionment determination may well be drastic, for it seems clear that a defendant could easily be strong-armed into settling where other defendants have settled in order to avoid being held

liable for the remainder of the response costs. Indeed, in this case the court determined that Alcan, one of 20 defendants, was liable for $473,790.18 in response costs, although the total response costs amounted to $1,302,290.18. Thus, although Alcan comprised only 5% of the defendant pool, it was required by the court to absorb over 36% of the costs. Furthermore, Alcan's share of the liability seems to be disproportionate on a volume basis as well. We also point out that contribution will probably not be available from a settling defendant in an action by the United States. 42 U.S.C. § 9613(f)(2).

We note, of course, that a determination in a given case that harm is indivisible will *not* negate a defendant's right to seek contribution from other non-settling defendants, as the contribution proceeding is an equitable one in which a court is permitted to allocate response costs based on factors it deems appropriate, whereas the court is not vested with such discretion in the divisibility determination.

***271** FN30. In addition, our approach is consistent with that in *O'Neil v. Picillo*, 883 F.2d at 182, and *United States v. Monsanto Co.*, 858 F.2d at 166, in which the courts approved the imposition of joint and several liability after determining that the harm was in fact indivisible.

FN** Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

892 F.Supp. 648

UNITED STATES of America, Plaintiff,
v.
ALCAN ALUMINUM CORPORATION, Defendant.

Civ. A. No. 89-CV 1657.
United States District Court,
M.D. Pennsylvania.

June 28, 1995.

***650** Margaret Kane Harrington, Land and Natural Resources Div., Environmental Defense Section, U.S. Dept. of Justice, Michael D. McIntyre, Environmental Enforcement Section, U.S. Dept. of Justice, Richard B. Stewart, Asst. Atty. Gen., Land and Natural Resources Div., U.S. Dept. of Justice, Washington, DC, Robert R. Long, Jr., Asst. U.S. Atty., Lewisburg, PA, John A. Morano, Jr., U.S. Atty's Office, Scranton, PA, Michael J. McNulty, Dept. of Justice, Environment & Natural Resource Div., Environmental Enforcement Section, Washington, DC, for plaintiff.

Gerry J. Elman, Frederic M. Wilf, Elman Associates, P.C., Media, PA, Lawrence A. Salibra, II, Cleveland, OH, for defendant.

MEMORANDUM

VANASKIE, District Judge.

This cost recovery action by the United States (the "Government") under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Sec. 9607(a), is before this Court on remand from the United States Court of Appeals for the Third Circuit. This Court was

directed to determine whether defendant Alcan Aluminum Corporation ("Alcan") can avoid or limit liability that otherwise may be imposed as a result of the fact that its used oil emulsion had been commingled with other oily wastes containing hazardous substances which discharged from a mine tunnel into the Susquehanna River in 1985 in the wake of Hurricane Gloria. See United States v. Alcan Aluminum Corp., 964 F.2d 252, 270-71 (3rd Cir.1992) ("Alcan-Butler"). Our Court of Appeals indicated that if Alcan established that its used "emulsion did not or could not, when mixed with other hazardous wastes, contribute to the release and the resultant response costs, then Alcan should not be responsible for any response costs." Id. at 270 (emphasis in original). In remanding this matter, the Third Circuit plainly contemplated that an evidentiary hearing would be conducted on the "intensely factual" issue of "whether there is a reasonable basis for limiting Alcan's liability based on its personal contribution to the harm to the Susquehanna River." Id. at 269.

Contrary to the expectations of the Third Circuit that an evidentiary hearing would be conducted on such complex matters as the relative toxicity, migratory potential, and synergistic capacity of the hazardous waste at issue, Alcan has reiterated its previously articulated argument that, as a matter of law, it cannot be held liable for any of the costs incurred by the Government in responding to the release of oily wastes into the Susquehanna River. (Docket Entry 135.) The crux of Alcan's argument is that those constituents of its oily waste that are defined to be "hazardous substances" under CERCLA (metals such as lead, cadmium, chromium, copper and zinc) are present in the used emulsion at concentrations below the naturally-occurring levels of those metals so that the presence of those metals in its used emulsion could not have caused any environmental harm. Alcan also

asserts that liability may not be imposed against it because the Environmental Protection Agency ("EPA") did not direct any response efforts to the removal of metals following the 1985 discharge. Alcan acknowledges that the arguments presented in its summary judgment motion are very similar to arguments it pursued before the Third Circuit, i.e., that its used emulsion did not cause any injury to the Susquehanna River because "'below ambient levels of any substance can never cause or contribute to a release or response costs.'" Id. at 270.

The Government has also moved for summary judgment on the remanded issue. (Docket Entry 131.) The gist of the government's argument is that this Court's inquiry is not to be restricted to the below ambient level of metals in the emulsion. According to the Government, "it was the emulsion as a whole, not just the individual constituents in the emulsion, which contributed to the harm...." (Brief in Support of Government's Summary Judgment Motion (Docket Entry 131) at 35.) Asserting that Alcan has failed to present any evidence on matters germane to a determination that its liability should not be joint and several, such as the percentage of the volume of total waste represented by Alcan's waste, the relative toxicity of Alcan's waste compared to other constituents ***651** of the oily mass, etc., the government maintains that it is entitled to summary judgment.

It is the law of this case that the addition of metals below ambient levels to Alcan's emulsion during the manufacturing processes brings the used emulsion within CERCLA's purview. 964 F.2d at 266-67. In assessing relative responsibility for environmental harm, therefore, the focus must be on the emulsion as a whole, and not its individual constituents. Because there is no evidence that the used emulsion was

environmentally safe, and in view of Alcan's failure to offer any other evidence on the question of whether there is a reasonable basis for determining the contribution of its used emulsion to the pollution of the Susquehanna River, Alcan's summary judgment motion will be denied and the Government's summary judgment motion will be granted. (FN1)

I.

FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF THE FACTS

The factual background of this case is set forth in the Third Circuit's Opinion, 964 F.2d at 255-57, and familiarity with that Opinion is assumed. It is sufficient for purposes of this Memorandum to recite only the following salient facts:

In its manufacturing processes, Alcan used an emulsion consisting of 95% deionized water and 5% mineral oil. (FN2)

During the manufacturing process, trace levels of copper, chromium, cadmium, zinc and lead were added to the emulsion. (FN3)

Copper, chromium, cadmium, lead and zinc are hazardous substances under CERCLA. 964 F.2d at 256.

The level of concentration of these hazardous substances in Alcan's used emulsion was below the naturally-occurring, or ambient, levels of these hazardous substances.

In the late 1970's, approximately 2 million gallons

of oily wastes containing hazardous substances were dumped down an air shaft or "borehole" leading to a network of coal mines and related tunnels, caverns, pools and waterways bordering the east bank of the Susquehanna River in Pittston, Pennsylvania. (Hereinafter referred to as the "Site.") The mine workings are drained by the Butler Tunnel, which discharges directly into the Susquehanna River.

From mid-1978 to late 1979, approximately 32,500 to 37,500 gallons of Alcan's used emulsion was dumped down the borehole leading to the mine workings serviced by the Butler Tunnel. (FN4)

In September of 1985, in the wake of Hurricane Gloria, approximately 100,000 gallons of oily waste contaminated with hazardous substances were discharged from the Butler Tunnel into the Susquehanna River.

EPA's response costs in addressing this release totalled $1,302,290.18. Response actions included "'containing an oily material on the river through the use of absorbent booms; immediately removing and disposing of 161,000 pounds (over 80 tons) of oil and chemical-soaked debris and soil, monitoring, sampling and analysis of air and water, and conducting hydrogeologic studies.'" 964 F.2d at 256-57.

***652** Alcan's used emulsion was commingled in the waste materials discharged into the Susquehanna River in September of 1985. (FN5)

The waste oils removed from the Susquehanna River contained cadmium, chromium, copper, lead and zinc. (FN6)

B. PROCEDURAL HISTORY

In November, 1989, the Government brought this action against 20 defendants who purportedly generated the waste materials dumped into the borehole and which discharged into the Susquehanna River. Included among the defendants was Alcan. The government settled with 19 of the defendants, and then moved for summary judgment against Alcan, the lone non-settling defendant. The government sought a determination that Alcan was jointly and severally liable for the remaining unreimbursed response costs of $473,790.18, or more than 35% of the total response costs of $1,300,000. Alcan cross moved for summary judgment, contending that its waste emulsion was not a "hazardous substance" as defined by CERCLA because levels of copper, cadmium, chromium, lead and zinc were below naturally-occurring levels.

Adopting the reasoning set forth in United States v. Alcan Aluminum Corp., 755 F.Supp. 531 (N.D.N.Y. 1991), aff'd in part and rev'd in part, 990 F.2d 711 (2nd Cir.1993), this Court found that Alcan's used emulsion was a hazardous substance under CERCLA and that Alcan was jointly and severally liable for the Government's unreimbursed response costs because the environmental harm caused by the commingled wastes was indivisible. Accordingly, judgment was entered against Alcan for $473,790.18.

On appeal, the Third Circuit affirmed this Court's holding that there is no threshold quantitative requirement for a waste to be defined as a "hazardous substance." Thus, because Alcan's used emulsion admittedly contained elements that fall within the definition of "hazardous substances" in CERCLA, see 42 U.S.C. Sec. 9601(14), the presence of its used emulsion

in the commingled mass of waste exposed Alcan to liability. In this regard, the appellate court rejected Alcan's argument that the Government must prove that Alcan's oily waste caused or contributed to the "release" or the government's incurrence of response costs. (FN7) Instead, as our Court of Appeals explained, "the Government must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs." 964 F.2d at 266 (emphasis in original).

The Third Circuit also rejected Alcan's contention that its used emulsion was excluded from CERCLA liability because it constituted "petroleum," which is exempted from the definition of hazardous substances in 42 U.S.C. Sec. 9601(14). Specifically, the court ruled that because Alcan's manufacturing processes added hazardous substances such as cadmium, chromium, copper, lead and zinc to the emulsion, albeit at below-ambient levels, the petroleum exclusion was inapplicable. In this regard, the court noted that "the relevant legislative history ... indicates that the exclusion was intended for oil spills, not for releases of oil which has become infused with hazardous substances through use." 964 F.2d at 267.

Responding to Alcan's assertion that extending CERCLA to materials that contained only ambient levels of hazardous substances would subject parties to joint and several liability even if the materials posed no threat to the environment, the Third Circuit held that the divisibility of harm rule set forth in Section 433A of the Restatement (Second) of Torts was applicable. The court explained that a party could avoid or limit liability by showing that its material could not cause any harm or by establishing a *653 reasonable basis for apportioning liability. 964 F.2d at 267-71.

Alcan urged that there was no need for an evidentiary hearing on the divisibility of harm issue, asserting that in this case "not only is the harm divisible, but [Alcan's] relevant contribution to the injury to the Susquehanna River is zero." Id. at 269-70. The Third Circuit, however, determined that it was not the appropriate forum to decide this issue in the first instance, observing that "whether Alcan is correct that its emulsion poses no threat to the environment, even when added to other hazardous substances, should be thoroughly investigated on remand in the factual hearing concerning the divisibility of harm." Id. at 264 n. 20. Thus, this matter was remanded to reconsider "Alcan's effort to avoid liability otherwise established." Id. at 269.

Following remand, the parties engaged in some discovery. Both the Government and Alcan then moved for summary judgment. Following the filing of briefs, oral argument was conducted. This matter is ripe for disposition. (FN8)

II.

DISCUSSION

A. Summary Judgment Standards

Summary judgment should be granted when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is "material" if proof of its existence or non-existence might affect the outcome of the suit under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Facts that could alter the outcome are material facts." Charlton v. Paramus Board of Education, 25 F.3d 194, 197 (3rd Cir.), cert.

denied, --- U.S. ---, 115 S.Ct. 590, 130 L.Ed.2d 503 (1994). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248, 106 S.Ct. at 2510. There is no issue for trial unless sufficient evidence favors the nonmoving party so that a jury could return a verdict for that party. Id., at 249, 106 S.Ct. at 2510-11. Rule 56 requires the entry of summary judgment where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

B. Alcan's Summary Judgment Motion on the Divisibility of Harm Issue

[1] The crux of the parties' dispute pertains to whether Alcan's potential contribution to the environmental harm to the Susquehanna River is limited to an assessment of the impact of the trace-level metals found in its used emulsion or should encompass the environmental significance of the used emulsion as a whole. Alcan insists that its potential liability can only be determined in the context of those constituents of its used emulsion that are defined to be "hazardous substances" and which render inapplicable CERCLA's petroleum exclusion--the heavy metals added in trace levels to its emulsion as a consequence of the manufacturing process. According to Alcan, the below background levels of the metal constituents of its used emulsion could not have caused an environmental problem relating to metals at the Site. Alcan also asserts that the Government's response actions were unrelated to the presence of metals. Thus, argues Alcan, it cannot be held liable for any of the Government's response costs.

The Government responds by contending that the absence of environmental problems and response actions related to metals at the Site are immaterial. According to the Government, "it was the emulsion as a whole, not just the individual constituents in the emulsion, which contributed to the harm at the Site." (Brief in support of the Government's Summary Judgment Motion (Docket Entry 131) at 35.)

*654 During oral argument, Alcan conceded that it cannot prevail on its summary judgment motion if the hazardous substance of concern is the used emulsion itself. (Tr. at 10.) Thus, the dispositive question here is whether the focus of the divisibility of harm issue should be on the emulsion as a whole or should be limited to its constituents. (FN9)

Alcan draws support for its position from the concluding paragraph of the Third Circuit Opinion, in which it is stated that "if Alcan can establish that the hazardous substances in its emulsion could not, when added to other hazardous substances, have caused or contributed to the release or the resultant response costs, then it should not be liable for any of the response costs." 964 F.2d at 271 (emphasis added). But elsewhere in its Opinion the Court of Appeals indicated that the inquiry should be directed to whether "the emulsion did not or could not, when mixed with other hazardous wastes, contribute to the release and resultant response costs...." Id. at 270 (emphasis in original and added). The court also stated that it would be Alcan's burden to show that "its emulsion poses no threat to the environment, even when added to other hazardous substances...." 964 F.2d at 264 n. 20. Thus, the question of whether this Court's inquiry should be limited to the "hazardous substances" found in the used emulsion is not answered by the Third Circuit opinion.

Essentially, Alcan is arguing that even if its used emulsion, as a whole, is environmentally harmful, it should not be subject to any liability because the constituents that remove the used emulsion from CERCLA's petroleum exclusion could not be the cause for that environmental harm. This effort to dissect its waste material into components regulated by CERCLA and those not regulated by CERCLA is not consistent with the remedial purposes sought to be advanced by this legislation. (FN10) Furthermore, a holding that the dumping of a petroleum-based liquid that falls outside CERCLA's petroleum exclusion because of the addition of heavy metals in the manufacturing process is not subject to CERCLA liability because the metals did not cause any environmental harm cannot be reconciled with "the legislative history which indicates that the [petroleum] exclusion was intended for oil spills, not for releases of oil which has become infused with hazardous substances through use." 964 F.2d at 267. As the Government pointed out during oral argument:

> [O]nce you add metals or any other foreign substance to the petroleum, if it doesn't exist in the state Congress and EPA recognize as the regulated state under other statutes, then it's a hazardous substance.... That's what makes it a hazardous substance.
>
> And it doesn't mean that you're allowed to then focus on each of the individual constituents or any threshold level with respect to those constituents. It means that the entire emulsion oil is a hazardous substance.

***655** [Tr. at 31-32.] (FN11)

In short, the environmental harm posed by the

medium that contains CERCLA-defined "hazardous substances" cannot be ignored. If the medium, with its "hazardous substance" constituents at ambient or below ambient levels, is environmental benign, even when mixed with other hazardous wastes, then liability should not be imposed. Thus, for example, if Alcan had generated federally-approved drinking water that was dumped into the borehole it would not be subject to liability because that drinking water, even though it contains naturally-occurring levels of chromium and other metals, could not have caused any environmental harm. (FN12)

In this case, Alcan has presented neither evidence nor argument that its used emulsion is environmentally benign. While the constituents of the used emulsion which bring it within CERCLA's ambit may not have contributed to the harm, Alcan has not contended that its used emulsion itself was harmless.

In this regard, Alcan's analogy to commingling sand (hazardous because it is an abrasive) and an explosive is inapt. The logical consequence of the Government's argument is <u>not</u> the imposition of joint and several liability on the generator of an inert substance classified as hazardous because of its abrasive characteristics (sand) merely because the sand was commingled with another substance classified as hazardous which must be removed from the commingled mass. Instead, under the analogy hypothesized by Alcan, liability would not be imposed on the generator of sand because no environmental harm was posed by that material. Indeed, it is likely that sand would contain naturally occurring levels of metals such as chromium, cadmium and zinc, and yet liability would not be imposed because the material, as a whole, did not pose any environmental threat.

In this case, if Alcan had presented evidence that its used emulsion, when mixed with the other hazardous wastes that were commingled in the Butler Tunnel discharge, could not pose any harm to the environment, Alcan would be in the same position as the generator of the sand. The mere commingling of materials that have constituents classified as "hazardous substances" would not result in the imposition of liability.

Another way to consider the issue is to determine whether the discharge of only the used emulsion into the Susquehanna River would have caused environmental harm warranting some cleanup response. Alcan has not argued that it could dump thousands of gallons of its used emulsion into a river without posing a threat to the environment. Because Alcan's used emulsion falls within CERCLA's purview, the complete absence of evidence that the used emulsion itself is environmentally benign compels denial of Alcan's summary judgment motion. (FN13)

***656** In short, it is the law of this case that Alcan's used emulsion falls within CERCLA's broad reach. Because Alcan has not presented any evidence from which it may be inferred that its used emulsion, when mixed with the other hazardous wastes, did not pose any threat to the environment or cause environmental harm, its request that judgment be entered in its favor must be denied.

C. The Government's Summary Judgment Motion on the Divisibility of Harm Issue.

[2] Simply because Alcan's arguments to avoid all liability have been rejected does not mean that the Government is entitled to summary judgment. Moreover, the mere fact that Alcan's used emulsion was commingled with other hazardous wastes does not, by

itself, warrant imposition of joint and several liability. As our Court of Appeals held, "'commingled' waste is not synonymous with 'indivisible harm'". 964 F.2d at 270 n.29. Accord, Cereghino v. Boeing Co., 873 F.Supp. 398, 402-03 (D.Or.1994).

But the Government's motion for summary judgment is not premised solely upon the commingling of hazardous waste. Instead, the Government asserts that it is entitled to summary judgment because Alcan has not presented any evidence on those matters germane to an apportionment of liability.

In remanding this matter, the Third Circuit directed that the divisibility of harm rule set forth in the Restatement (Second) of Torts should govern the determination of whether joint and several liability should be imposed. As the Court explained:

> Section 433A of the Restatement provides that, when two or more joint tortfeasors acting independently cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the harm that the individual tortfeasor has caused. 964 F.2d at 268.

Accord, Redwing Carriers, Inc. v. Saraland Apartments, Ltd., 875 F.Supp. 1545, 1568 (S.D.Ala.1995) The burden is on the defendant to "prove that there is a way to determine what portion of the 'harm' (i.e. the hazardous substances present at the facility and the response costs incurred in dealing with them) is fairly attributable to [the defendant], as opposed to other responsible parties." United States v. Rohm and Haas Co., 2 F.3d 1265, 1280 (3rd Cir.1993). Consistent with the Third Circuit's approach, the Fifth Circuit has explained that "[i]f the expert testimony and other evidence establish

a factual basis for making a reasonable estimate that will fairly apportion liability, joint and several liability should not be imposed in the absence of exceptional circumstances." In re Bell Petroleum Services, Inc., 3 F.3d 889, 900 (5th Cir.1993). The "divisibility" inquiry is thus similar to the "contribution" inquiry in that the concern is the harm caused by the defendant. Alcan-Butler, 964 F.2d at 270 n.29.

[3] Where, as here, hazardous wastes are commingled, apportionment of liability must take into account "evidence disclosing the individual and interactive qualities of the substances deposited there." United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir.1988), cert. denied, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989). Among the matters to be considered are the "relative toxicity, migratory potential and synergistic capacity" of the various substances present. Alcan-Butler, 964 F.2d at 269. Accord, United States v. Broderick Investment Co., 862 F.Supp. 272, 276 (D.Colo.1994). Generally speaking, an inquiry into apportionment of liability is "intensely factual." Alcan-Butler, 964 F.2d at 269. Accord, United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2nd Cir.1993.) Moreover, the burden on the defendant is "substantial." Alcan-Butler, 964 F.2d at 269.

The Government has moved for summary judgment in light of Alcan's failure to proffer any evidence on such matters as relative toxicity, migratory potential, and synergistic characteristics of the oily wastes dumped into the Butler Tunnel borehole. Alcan, for example, has not compared the chemical composition ***657** of its used emulsion to other wastes dumped into the borehole. It has not addressed the question of whether its used emulsion could have reacted with the other oily wastes under the circumstances present in the mine workings. Nor has it suggested the likely products of any chemical

reactions. Instead, its entire argument on the joint and several liability issue is premised upon the contention that " 'its emulsion contains below ambient, ubiquitous, immobile and insoluble metal compounds similar to those naturally found in the soil at the Site and capable of causing no harm to the environment....' " (Brief in support of Government's Summary Judgment Motion (Docket Entry 131) at 33-34.) Alcan also asserts that, because metals were not targeted for remediation, "all of the issues which the Third Circuit stated should be addressed on remand such as the metals' ability to concentrate and cause a problem are irrelevant to this case." (Reply Brief in Support of Alcan's Summary Judgment Motion (Dkt.Entry 154) at 6.)

During oral argument, Alcan was questioned as to whether it intended to present evidence "concerning the toxicity and migratory potential and other factors related to its emulsion to support an argument of divisibility of harm or a reasonable basis for apportionment [of damages]." (Tr. at 20-21.) Alcan responded by asserting that "the evidence that we will present is [that the concentration level of metals] is less than background and it caused no harm...." (Tr. at 21.) Because the inquiry is not limited to metals in the emulsion, Alcan's failure to present evidence on these key issues is untenable. (FN14)

Alcan also did not present evidence or argument on the issue of whether apportionment of liability on a volumetric basis would be appropriate here. Evidence that the wastes of other generators deposited into the borehole were similar to Alcan's used emulsion could support an apportionment of liability on a volumetric basis. Cf., Bell Petroleum Services, 3 F.3d at 903-04 (apportionment of liability appropriate where there is a single harm attributable to essentially fungible wastes). As the Third Circuit observed, apportionment is

common in cases of pollution of a stream by two or more parties. (FN15) But Alcan eschewed the opportunity to limit its liability to the ratio of its wastes to total wastes dumped into the borehole. Instead, Alcan pursued an "all or nothing" approach.

It was Alcan's burden to present facts sufficient to create a triable issue on apportionment of liability. Alcan's exclusive reliance on the fact that metals contained in its used emulsion were below ambient levels does not present a genuine dispute as to a material fact. Because Alcan has failed to present other evidence pertinent to the divisibility of harm inquiry, summary judgment in favor of the Government in the full amount of its unreimbursed response costs of $473,790.18, is warranted. (FN16)

***658** D. The Act of God Defense

[4] In its Motion for Summary Judgment, Alcan argues that any release of hazardous substances was caused solely by an act of God, specifically, Hurricane Gloria. Alcan contends that the release occurred in connection with the torrential downpour of rain associated with the hurricane. (FN17)

Under the act of God defense, no liability attaches to a person who would otherwise be liable if that person can establish that the release of the hazardous substance and the damages which result were caused solely by an act of God. 42 U.S.C. Sec. 9607(b). An act of God is defined as:

> an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight. 42 U.S.C. Sec. 9601(1).

In United States v. Stringfellow, 661 F.Supp. 1053 (C.D.Cal.1987), the defendants contended that "heavy rainfall" was a natural disaster which constituted an act of God. The court concluded that heavy rainfall was "not the kind of 'exceptional' natural phenomenon" to which the "act of God exception applies." Id. at 1061.

[5] Alcan, however, maintains that the release at the Site was caused not simply by heavy rainfall but by a hurricane which is "a grave natural disaster or phenomenon." Moreover, Alcan asserts that the hurricane was "unanticipated" as far north and inland as Pennsylvania. (Dkt.Entry 135 at 24.)

Alcan's reliance on the act of God defense must be rejected for at least three reasons. First, no reasonable factfinder could conclude that Hurricane Gloria was the sole cause of the release and resulting response costs. Two million gallons of hazardous wastes were not dumped into the borehole by an act of God, and were it not for the unlawful disposal of this hazardous waste Hurricane Gloria would not have flushed 100,000 gallons of this chemical soup into the Susquehanna River.

Second, the effects of Hurricane Gloria could "have been prevented or avoided by the exercise of due care or foresight." 42 U.S.C. Sec. 9601(1). Clearly, exercise of due care or foresight would have militated against dumping hazardous wastes into mine workings that inevitably lead to such a significant natural resource as the Susquehanna River.

Finally, as the Court in Stringfellow recognized, heavy rainfall is "not the kind of 'exceptional' natural phenomenon to which the act of God exception applies." 661 F.Supp. at 1061. Accordingly, it is appropriate to

enter judgment in favor of the Government on Alcan's act of God defense.

III.

CONCLUSION

Alcan has not met its "substantial" burden of proof with regard to the divisibility of harm at the Site. In fact, Alcan has not presented objective evidence relating to the relative toxicity, migratory potential or synergistic capacity of the hazardous waste at issue. Furthermore, Alcan has not attempted to demonstrate what volume of waste was disposed of at the Site, nor the percentage of that volume represented by Alcan's wastes. Alcan has not considered the effect of the commingling of its wastes with the other wastes at the site. Nor has Alcan presented a triable issue of fact with respect to the act *659. of God defense. Therefore, summary judgment will be granted in favor of the United States and Alcan's Motion for Summary Judgment will be denied. An appropriate Order is attached.

ORDER

AND NOW THIS 28th DAY OF JUNE, 1995, in accordance with the attached Memorandum, IT IS HEREBY ORDERED THAT:

1) Plaintiff United States of America's Motion for Summary Judgment (Dkt.Entry 131) is GRANTED.

2) Defendant Alcan Aluminum Corporation's Motion for Summary Judgment (Dkt.Entry 135) is DENIED.

3) The Clerk of Court is directed to enter judgment in favor of the Plaintiff in the amount of $473,790.18.

FN1. Alcan has also sought to avoid liability on the basis of the "act of God" defense. See 42 U.S.C. Sec. 9607(b)(1). Alcan contends that the oily waste was flushed into the Susquehanna River by torrential rains of Hurricane Gloria. Because it is clear that Alcan cannot demonstrate that the release in question was caused solely by Hurricane Gloria, Alcan's summary judgment motion on the "act of God" defense will also be denied.

FN2. "An emulsion is composed of two immiscible liquids." Lee, et al., General and Organic Chemistry (1971) at 530. In this case, the mineral oil and deionized water are immiscible, that is, they are insoluble in each other. Id. at 260.

FN3. See, paragraph 9 of the Government's Statement of Material Facts (Docket Entry 132), and Alcan's response thereto. (Docket Entry 149.)

FN4. The Government contends that as much as 120,000 gallons of Alcan's used emulsion was dumped into the borehole, but Alcan disputes this assertion. For purposes of the parties' summary judgment motions, it will be assumed that the amount of Alcan's waste poured into the borehole was that set forth in the text. This volume of waste was also relied upon by the Third Circuit in its opinion. See, 964 F.2d at 256 and 270 n. 29.

FN5. Paragraph 49 of the Government's Statement of Material Facts (Docket Entry 132), and Alcan's response thereto. (Docket Entry 149.)

FN6. Paragraph 43 of the Government's Statement of Material Facts (Docket Entry 132), and Alcan's response thereto. (Docket Entry 149.)

FN7. A "release" includes the discharging or dumping into the environment of any hazardous substance. 42 U.S.C. Sec. 9601(22).

FN8. The transcript of the oral argument ("Tr.") is in the record as Docket Entry 158.

FN9. Alcan's exclusive reliance on arguments pertaining to the constituents of its emulsion that subject Alcan to CERCLA liability is evidenced by its Statement of Material Facts, which on the divisibility of harm issue consists entirely of the following five statements:

1. The addition of below background metal compounds cannot cause or contribute to a release of metal compounds.

2. There was no release of metal compounds from the Butler Mine Tunnel.

3. There was no environmental problem relating to metals at the Butler Tunnel Mine Site.

4. There were no response efforts directed to remediation of metals at the Site, the constituents that rendered the Alcan emulsion a CERCLA "hazardous substance."

5. The response actions at the Butler Mine Tunnel Site were related to remediation of an oil spill, and were unrelated to metals or other hazardous substances.

The Government, while disputing most of these factual assertions, maintains that all the assertions are immaterial. For purposes of considering Alcan's Summary Judgment Motion, its factual assertions

have been accepted as true. Because the assertions do not affect the outcome of this case, they are not material. Charlton, 25 F.3d at 197. If this Court's inquiry were to be limited to the constituents of the emulsion that are classified as "hazardous substances," it would be necessary to conduct an evidentiary hearing to resolve the disputes with respect to those assertions.

FN10. CERCLA, of course, is to "be construed liberally to effectuate its goals." Alcan-Butler, 964 F.2d at 258.

FN11. Support for this conclusion may be gleaned from the Second Circuit's decision reversing Judge McAvoy's ruling on which this Court had relied in granting summary judgment in favor of the Government in the first instance. See United States v. Alcan Aluminum Corp., 990 F.2d 711 (2nd Cir.1993). Although the environmental harm at issue in the Second Circuit case is different from the environmental harm involved here, the material, Alcan's used emulsion, remains the same. The Second Circuit ruled that "Alcan may escape any liability for response costs if it either succeeds in proving that its oil emulsion, when mixed with other hazardous wastes, did not contribute to the release and the cleanup costs that followed, or contributed at most to only a divisible portion of the harm." Id. at 722 (emphasis added). Thus, the Second Circuit indicated that the focus of any effort to avoid liability must be on the emulsion itself, and not on the constituents of that emulsion.

*659 FN12. As Alcan argues, "'[w]hen one adds two materials that have the same concentrations of an element or compound, the net result is the same concentration.'" Alcan-Butler, 964 F.2d at 270 (emphasis in original). Thus, in the drinking water

context, the medium for transport of the hazardous substances would not have increased the concentration of metals and would not otherwise pose a threat to the environment.

FN13. Clearly, this result does not mean that liability may be imposed on any party that has generated materials which include constituents that are classified as hazardous substances. But if the material, as a whole, is environmentally harmful, the fact that the material contains hazardous substances brings it within the ambit of CERCLA liability even though the threat to the environment is not posed by the components that are classified as hazardous substances. Thus, for example, if thousands of gallons of milk (otherwise a non-hazardous material) are dumped into a stream and that milk is harmful to the environment, then the fact that it contains elements or compounds classified as "hazardous substances" under CERCLA may indeed make the generator of that milk liable for the costs incurred in responding to the release and resultant environmental harm.

FN14. Alcan acknowledged that the argument it was advancing was essentially the same as the argument it had made to the Third Circuit:

THE COURT: Mr. Salibra, is the argument that you are making today much different than the argument you made to the Third Circuit when this was up on appeal?

MR. SALIBRA: It is no different in substance and in science ... and, as you know, I advocated that they really need not go back to [this] Court to look at the science of it to understand it.

My view is they felt it was a fact issue, and they just didn't want to deal with the fact issue, even if I was right. They were going to let that be made by the District Court. [Tr. at 36-37.]

FN15. In Bell Petroleum Services, 3 F.3d at 903, the Fifth Circuit recognized that "pollution of a stream may be treated as divisible in terms of degree, and [liability] apportioned among the defendants on the basis of evidence of the respective quantities of pollution discharged by each."

FN16. I am sensitive to the fact that "CERCLA 'can be terribly unfair in certain instances in which parties may be required to pay huge amounts for damages to which their acts did not contribute.'" Redwing Carriers, Inc. v. Saraland Apartments, Ltd., 875 F.Supp. 1545, 1568 (S.D.Ala.1995). This unfairness may be intensified where, as here, contribution from settling defendants may not be available. See 42 U.S.C. Sec. 9613(f)(2); 964 F.2d at 270 n.29. As our Court of Appeals recognized, Alcan's share of liability seems disproportionate from both a per capita and volumetric perspective. Id. But it is Alcan who chose the "all or nothing" approach, and it is this approach which obviates an evidentiary hearing on the "intensely factual" questions relevant to an apportionment of liability. In this regard, if I have misconstrued Alcan's position on this issue, Alcan can seek reconsideration of this decision.

FN17. The Government argues that because Alcan failed to raise this defense when this case was first presented on cross-motions for summary judgment that were then appealed to the Third Circuit, Alcan should be precluded from raising it at this stage of the proceedings. While it does seem incongruous

that Alcan could have judgment entered against it and, on appeal, obtain a remand only on the issue of apportionment of liability, and then raise on remand a complete defense to liability based on the act of God defense, this Court does have discretion to address the merits of this affirmative defense. See Habecker v. Clark Equipment Co., 942 F.2d 210, 217-18 (3rd Cir.1991). Despite the apparent unfairness of pursuing an affirmative defense for the first time on remand, (Alcan did assert the act of God defense in its response to the Complaint), discretion will be exercised to address the substance of Alcan's argument.

755 F.Supp. 531

UNITED STATES OF AMERICA and
STATE OF NEW YORK, Plaintiffs,
v. ALCAN ALUMINUM CORP., et al., Defendants.

ALCAN ALUMINUM CORP.,
Third-Party Plaintiff, v.
CORNELL UNIVERSITY, Third-Party Defendant

No. 87-CV-920

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF YORK

755 F. Supp. 531; 1991 U.S. Dist. LEXIS 522;
32 ERC (BNA) 1826; 21 ELR 20767

January 15, 1991, Decided
January 15, 1991, Filed

COUNSEL: [**1] Frederick J. Scullin, Jr., United States Attorney, Craig A. Benedict, Syracuse, New York, Richard B. Stewart, Assistant Attorney General, Michael Bardee, Henry Friedman, Land and Natural Resources Division, Environmental Enforcement Section, Washington, District of Columbia, for Plaintiff United States. Robert Abrams, Attorney General, David A. Munro, Karen Kimball, State of New York, Albany, New York, for Plaintiff State of New York.

Lawrence A. Salibra, II, Cleveland, Ohio, for Defendant Alcan Aluminum Corp.

Thomas Mead Santoro, Patricia McClary, Cornell University, Office of University Counsel, Ithaca, New York, for Third-Party Defendant Cornell University.

JUDGES: Thomas J. McAvoy, United States District Judge.

OPINION BY: McAVOY

OPINION: [*534]

MEMORANDUM - DECISION AND ORDER

THOMAS J. McAVOY, UNITED STATES DISTRICT JUDGE

Introduction

By this action, the United States of America and the State of New York initially sought to recover from some 83 business entities response costs under section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607 (as amended), in connection with the clean-up of an inactive hazardous waste site formerly owned by Pollution Abatement Services of Oswego, Inc. (PAS) and currently owned by [**2] the County of Oswego. At the time the action was commenced, those costs exceeded $ 12 million. Shortly after commencement, plaintiffs entered into a consent decree with 82 of the defendants recovering some $ 9,105,308.17; Alcan Aluminum Corp. was the lone holdout and the suit continued as against it for the difference between the stipulated amount of incurred costs ($ 12,319,551.04) and the amount recovered in the partial settlement. Additional costs have been incurred since then and currently total in excess of $ 13 million. Discovery having been concluded, the parties' dispute (in the main action) is before the court on cross motions for summary judgment. The third-party action is also before the court on cross motions for summary judgment. For the reasons that follow, the court grants

the motions of the United States and the State of New York as against Alcan Aluminum Corp. in their entirety in the main action and thereby denies Alcan's motion; insofar as the third-party action is concerned, the court grants Alcan's motion to the extent of declaring that third-party defendant Cornell University is also liable for its fair share of response costs incurred by the United States and [**3] the State of New York and accordingly denies the motion of Cornell University. A hearing is necessary to determine the amount of that fair share.

Background

A. Historical

From approximately 1970 until 1977, various chemical waste materials were received for disposal or treatment at the PAS site. As a result of PAS operations, the site's surface became contaminated by hazardous substances because of wastes leaching from drums, lagoons being overtopped and surface runoff.

[*535] During the 1970 through 1977 period, Alcan, by contract, agreement or otherwise, arranged for the disposal or treatment at the PAS facility 4,607,380 gallons of an emulsion generated at its plant in Oswego, New York in conjunction with the hot rolling of aluminum ingots. (In addition to aluminum, the ingots used by Alcan contained chromium, copper, lead and zinc.) The Alcan emulsion, basically a mixture of water (primarily) and mineral oil, was circulated and recirculated through the rolls, picking up fragments of ingots containing aluminum, chromium, copper, lead and zinc in the process, until removed from the manufacturing process and sent to the PAS facility. (In addition to aluminum, chromium, copper, [**4] lead and zinc, defendant concedes that its emulsion

contained cadmium.) During this period, Alcan, by contract, agreement or otherwise also arranged for the disposal at the PAS facility of 200 gallons of polychlorinated biphenyls.

In 1976 and 1977, the United States began undertaking response measures at the PAS site; in 1978, the State, in conjunction with the United States, conducted a surficial cleanup which included removing 4,000 drums from the site; in 1982, the United States and the State entered into a formal cooperative agreement to address the environmental problem posed by the PAS site. This lawsuit followed.

B. Statutory

Through CERCLA, enacted in 1980 as a comprehensive response to the environmental threat posed by the disposal of hazardous substances, Congress has provided the federal government and the States, through cooperative agreements with the Environmental Protection Agency, with an effective means to clean up toxic waste sites around the country and with the authority to force those persons responsible for creating the hazardous conditions to bear the cost of the cleanups. See United States v. Monsanto Co., 858 F.2d 160, 167 and n. 8 (4th Cir. 1988), [**5] cert. denied, 490 U.S. 1106, 109 S. Ct. 3156, 104 L. Ed. 2d 1019 (1989); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); State of New York v. Shore Realty, 759 F.2d 1032, 1040-1041 (2d Cir. 1985); 42 U.S.C. §§ 9604(d)(1) and 9607(a) (1983 and Supp. 1990). In pertinent part, CERCLA provides as follows:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-- . . . . (3) any person who by contract,

agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . . at any facility . . . owned or operated by another party or entity and containing such hazardous substances . . . . . from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for-- (A) all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan[.] 42 U.S.C. § 9607(a)(3) (Supp. 1990); see also Shore Realty, 759 F.2d at 1043, 1043 n. 16 (commenting on the correct construction of section [**6] 9607(a)).

As various courts have noted, liability under CERCLA, which is strict, Shore Realty, 759 F.2d at 1044, and joint and several unless the defendant demonstrates that the harm is divisible, O'Neil v. Picillo, 883 F.2d 176, 178-179 (1st Cir. 1989), cert. denied sub nom. American Cyanamid Co. v. O'Neil, 493 U.S. 1071, 107 L. Ed. 2d 1022, 110 S. Ct. 1115 (1990), would be established in this "cost recovery" action if the plaintiffs prove each of the following:

1) the PAS site is a "facility" within the meaning of 42 U.S.C. § 9601(9)(B); 2) a "release", see 42 U.S.C. § 9601(22), or "threatened release" of hazardous substances, see 42 U.S.C. § 9601(14), has occurred at the PAS site; 3) the release or threatened release has caused the United States and the State of New York to incur response costs, see 42 U.S.C. § 9607; and

[*536] 4) Alcan falls with at least one of the four classes of responsible persons described in 42 U.S.C. § 9607(a),

see United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1378-1379 (8th Cir. 1989); see also Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 [**7] (1st Cir. 1989); Shore Realty, 245 App. D.C. 196, 759 F.2d at 1043-1045, and if Alcan fails to establish by a preponderance of the evidence one of the three narrow defenses provided by 42 U.S.C. § 9607(b), Amoco Oil, 889 F.2d at 668; Shore Realty, 759 F.2d at 1042, 1044. Liability under CERCLA in a "cost recovery" action presents an issue separate and distinct from that posed by the issue regarding which incurred response costs defendant is obligated to pay. Amoco Oil, 889 F.2d at 668.

Discussion

A. Alcan's liability

Much of what plaintiffs need to prove in order for liability to be imposed on Alcan is not in dispute. In its attempt to resist liability, Alcan argues essentially that the concentrations of cadmium, chromium, copper, lead and zinc in its emulsion are less than background levels and, therefore, do not constitute hazardous substances under CERCLA. Slightly more specifically, Alcan seeks to have this court read into the statutory and regulatory scheme (1) a requirement that in order for the listed substances to be deemed "hazardous" these substances must be present in a certain amount or concentration and (2) a requirement that the listed substance be present in [**8] a "harmful" form, after all, defendant argues, several of these substances and many listed by the EPA occur naturally and are even essential to the continued existence of life. Underlying defendant's position, however, is, perhaps, the more fundamental argument, related to its argument that substances must be in a specific form in order to be deemed "hazardous,"

that its waste oil emulsion and the substances it concedes were contained therein are not specifically listed in the 40 C.F.R. § 302.4 Table of Hazardous Substances and, therefore, the court must apply the provisions of 40 C.F.R. § 302.4(b) pertaining to unlisted substances in order to determine whether its waste oil emulsion and the cadmium, chromium, copper, lead and zinc contained therein are "hazardous substances" under CERCLA. This is so, defendant argues, because the "generic headings" in the Table 302.4 list do not have a Chemical Abstract Service Registry Number, a Reportable Quantity or a Resource Conservation and Recovery Act number. For the reasons that follow, defendant's position is rejected as meritless; suffice it to say that the court will not rewrite the statutory and regulatory scheme to suit defendant's needs [**9] and desires. Congress and the EPA, through a congressional grant of authority, have spoken; the court's task is to apply the law in as straightforward a manner as possible, consistent with the dictates of the Constitution, so as to give full effect to the policy underlying CERCLA.

A "hazardous substance" is defined in CERCLA by reference to its provisions and to that of other environmental statutes. Specifically, Congress has provided that the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been

suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed [**10] under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has [*537] taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). 42 U.S.C. § 9601(14) (Supp. 1990); see also id. § 9602(a) (Supp. 1990) (authorizing the Administrator to designate additional substances which, when released into the environment, may present substantial danger to the public health or welfare or the environment). Hazardous substances under CERCLA, then, include all substances so designated under other statutes pursuant to the grant of authority contained therein in addition to substances so designated by the EPA pursuant to the grant of authority under 42 U.S.C. § 9602(a). See United States v. Monsanto Co., 858 F.2d at 165 n.4. Accordingly, pursuant [**11] to the various grants of authority under other environmental laws, the EPA has promulgated a list of "hazardous substances" under section 311(b)(2)(A) of the Clean Water Act (codified at 40 C.F.R. Table 116.4 (1990)), a list of "toxic pollutants" under section 307(a) of the Clean Water Act (codified at 40 C.F.R. § 401.15 (1990)), a list of "hazardous wastes" under section 3001 of the Resource Conservation and Recovery Act (appearing at 40 C.F.R. §§ 261.30-261.33 (1990)), and a list of "hazardous air pollutants" pursuant to section 112 of the Clean Air Act (codified at 40 C.F.R. § 61.01(a) (1989)). Additionally,

pertinent CERCLA regulations provide that "'hazardous substance' means any substance designated pursuant to 40 CFR Part 302," 40 C.F.R. § 302.3 (1989), and that "the elements and compounds and hazardous wastes appearing in Table 302.4 are designated as hazardous substances under section 102(a) of the Act [i.e., 42 U.S.C. § 9602(a)]," 40 C.F.R. § 302.4 (1989). It bears noting, however, that each of the elements, compounds and hazardous wastes appear on the Table 302.4 List of Hazardous Substances by virtue of one or more of four statutory sources--to wit, sections 307(a) and [**12] 311(b)(4) of the Clean Water Act, section 112 of the Clean Air Act and section 3001 of the Resource Conservation and Recovery Act. See 40 C.F.R. § 302.4 note and Table 302.4 footnotes. Table 302.4, then, appears to be nothing more than a compilation of hazardous substances so designated already under the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act. In response to defendant's argument, suffice it to say that "the plain statutory language fails to impose any quantitative requirement on the term hazardous substance," Amoco Oil, 889 F.2d at 669, and, as noted in Amoco Oil, that the mere listing of an element, compound or hazardous waste establishes that a substance is hazardous as a matter of law is a holding supported by courts that have considered the definitional requirements of the term and the congressional comments contained in the legislative history, id. (citing Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d at 1151-1152; Eagle-Picher Indus. v. United States, 245 U.S. App. D.C. 196, 759 F.2d 922, 927 (D.C.Cir. 1985); City of New York v. Exxon Corporation, 744 F. Supp. 474, 483-487 (S.D.N.Y. 1990); United States v. Metate Asbestos [**13] Corp., 584 F. Supp. 1143, 1147 (D. Ariz. 1984)); United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2125, 2126 (D.S.C. 1984); see also United States

v. Western Processing Co., Inc., 734 F. Supp. 930, 936 (W.D. Wash. 1990) (government need not prove that the release was above background levels; the principle that the law does not concern itself with trifles is not a defense to CERCLA liability); United States v. Nicolet, Inc., 712 F. Supp. 1205, 1207 (E.D. Pa. 1989) (noting that, "as long as a substance is on one or more of the lists identified at 42 U.S.C. § 9601(14), it is a hazardous substance irrespective of the volume or concentration of the substance found at the site in question"). In the court's view, there is no principled basis upon which to deviate from the foregoing rule that the mere listing of a substance [*538] by EPA renders that substance hazardous. That various listed substances are naturally found in the environment (i.e., in the normal course of events) does not stand in the way of imposing liability against a generator of that substance--the corporate generator, a non-natural person, has added to what nature has already seen fit to provide for the [**14] continued existence of various life forms on this planet; that Congress has enacted laws to limit, and perhaps limit quite severely, additions to nature for the sake of the environment and of life on this planet seems eminently reasonable. Similarly, there is simply nothing in the statute or the regulations which supports the view that a particular substance is "hazardous" only if it is in a specific chemical form, that is, in a form that makes the substance water-soluble. Also, the compound containing a listed element found in the released matter need not itself be specifically and separately listed--such compounds are hazardous substances under CERCLA by virtue of their inclusion, insofar as is pertinent here, in the specifically listed generic or broad class of elements and compounds designated under section 307(a)(1) of the Clean Water Act: "chromium and compounds," "copper and compounds," "lead and compounds," and "zinc and compounds" are expressly so included in "the list of

toxic pollutants designated pursuant to section 307(a)(1) of the [Clean Water] Act," 40 C.F.R. § 401.15 (1990), thereby rendering all of these elements and their compounds "hazardous substances" under [**15] CERCLA; this list was expressly made a part of the Table 302.4 List of Hazardous Substances. That the generic or broad class of hazardous elements and compounds does not itself have a "Chemical Abstract Service Registry Number" (CASRN) is immaterial inasmuch as that number appears only for the convenience of the user. See 40 C.F.R. § 116.4. That the generic or broad class of hazardous elements and compounds was not assigned a Final RQ (Reportable Quantity), a quantity of the hazardous substance the release of which requires notification, see 40 C.F.R. §§ 302.3, 302.5 and 302.6, although it has been assigned a statutory RQ, is also immaterial inasmuch as a substance is deemed hazardous presumably because of the unacceptable risks it poses to human health and to the environment. There is simply no requirement in the statutory or regulatory scheme that an element or compound have an RQ in order for it to be "hazardous," and, in fact, the statutory scheme reveals otherwise. The term "hazardous substance" includes any toxic pollutant listed under section 307(a) of the Clean Water Act, see 42 U.S.C. § 9601(14)(D), yet these listed toxic pollutants do not have a final RQ (nor [**16] do they have a CASRN, for that matter).

The court notes in passing its disagreement with the court in City of New York v. Exxon Corporation to the extent that that court appears to have held, at least preliminarily, that 40 C.F.R. § 302(b) and not section 302(a) is applicable to determining whether Alcan's waste oil emulsion or the specific compounds in it are hazardous substances under CERCLA because the waste oil emulsion and the specific compounds found

therein are not squarely listed in Table 302.4. See 744 F. Supp. at 487-488. Suffice it to say, first, that Alcan has conceded that its waste oil emulsion contained cadmium, chromium, copper, lead and zinc and, second, that these elements and all their respective compounds are hazardous substances under CERCLA by virtue of their designation as toxic pollutants under the Clean Water Act which list was, as has already been noted, included, pursuant to 42 U.S.C. § 9601(14)(B) and perhaps redundantly so, in the Table 302.4 List of Hazardous Substances and Reportable Quantities; as such, the court need not ever consider the pertinence of 40 C.F.R. § 302.4(b) (and the regulations--40 C.F.R. §§ 261.2,.4(b) and.20-.24--referenced [**17 therein) and therefore it is unnecessary for the court to engage in any discussion of ignitability, corrosivity, reactivity or EP (Extract Procedures) toxicity to determine whether a substance is to be deemed "hazardous."

The court also notes its disagreement with the court in Amoco Oil to the extent that that court has seemingly read into the language of 42 U.S.C. § 9607(a)(4) the requirement [*539] that, in order for a release of a hazardous substance to have caused (and justified) the incurrence of response costs, and hence in order for there to be liability, the release violate some applicable State or Federal standard imposing a threshold quantity or concentration requirement. See 889 F.2d at 669-672. In essence, that court, while recognizing that the "plain statutory language fails to impose any quantitative requirement on the term hazardous substance," id. at 669, has imposed such a requirement on the imposition of liability in the attempt to limit the scope thereof. Suffice it to say that such an interpretation (which the Amoco Oil court conceded necessitated the "entry of unexplored territory," id. at 670) is not warranted by the plain language of the statute [**18] and in fact appears

to conflict with that language. See United States v. Western Processing Co., 734 F. Supp. at 936-937 and 941-942 (concluding that Amoco Oil should be confined to its facts and implicitly calling that court's reasoning into doubt).

As part of its effort to resist liability, defendant also argues that the "petroleum exception" to the term "hazardous substance" is applicable here. The pertinent CERCLA provision, 42 U.S.C. § 9601(14) (defining "hazardous substance") (quoted above), states that "[hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph . . . ." Specifically, defendant argues that its emulsion contains levels of metals designated as hazardous substances well below that found in virgin oil and, therefore, its "waste is clearly within the petroleum exclusion." Defendant's Memo of Law at 11. Disposing of this argument need not detain the court for long.

Suffice it to say that a plain reading of this "exclusionary" provision does not warrant inclusion of oil which has become contaminated [**19] with hazardous substances through use; rather, what does come within the ambit of the "petroleum exclusion" is the oil or oil fraction which naturally contains the hazardous substance(s) unless the fraction itself is specifically listed or designated as a hazardous substance. This interpretation of the "petroleum exclusion" appears to be in line with the legislative history, scant as it is, which indicates that the "petroleum exclusion" is an exclusion from CERCLA for "oil spills" themselves and not for releases of oil which through use has become contaminated with (hazardous) substances not naturally found in oil. See, e.g., S. Rep. No. 848, 96th Cong., 2d

Sess. 30-31 (1980); 126 Cong. Rec. H11787, H11790, H11792, H11793, H11795, H11796, H11798 (daily ed. December 3, 1980); 126 Cong. Rec. S10578 (daily ed. August 1, 1980); id. at S10845 (daily ed. August 5, 1980); id. at S14963, S14967, S14974, S14980 (daily ed. November 24, 1980).

Lastly, defendant advances two constitutional challenges to imposition of liability: first, that the statute is void for vagueness because it does not adequately define "hazardous substance"; second, that the "selective" enforcement of CERCLA [**20] against it, the government choosing not to name other, allegedly more culpable entities--e.g., Cornell University--as defendants, violates the principle of equal protection of the laws.

Neither challenge has merit. The void for vagueness challenge fails because, in the court's view, the statute and regulations do not fail to give a person of ordinary intelligence fair notice of what is required and forbidden. See Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, 843, 31 L. Ed. 2d 110 (1972); see also United States v. McElroy, 910 F.2d 1016, 1021 (2d Cir. 1990) (observing that a penal statute is not unconstitutionally vague if it "defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). Moreover, it has been observed that "the degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment[,]" Village of Hoffman Estates v. [*540] Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498, 102 S. Ct. 1186, 1193, 71 L. Ed. 2d 362 (1982), and that with respect to "regulatory statutes governing business activities, [**21] greater leeway is allowed," Papachristou, 405 U.S. at 165, 92 S. Ct. at 845. All the more is this so when matters of public

health and safety are concerned. See West Virginia Manufacturers Ass'n v. State of West Virginia, 714 F.2d 308, 314 (4th Cir. 1983). To withstand a void for vagueness challenge, it is sufficient if the meaning of the statutory or regulatory language is discoverable from its context. See id. In this regard, the court notes that a plain reading of the statutory and regulatory scheme reveals that a substance is hazardous if it has been listed, i.e., so designated, by the EPA pursuant to authority granted it by Congress.

As for defendant's other constitutional challenge, putting aside the broad discretion the government has regarding the exercise of its power to prosecute, see Wayte v. United States, 470 U.S. 598, 607-608, 105 S. Ct. 1524, 1530-1531, 84 L. Ed. 2d 547 (1985), defendant has not established a prima facie case of selective enforcement. Simply stated, defendant has not shown that it has been singled out for civil prosecution for an improper purpose. See University Club v. City of New York, 655 F. Supp. 1323, 1328 (S.D.N.Y. 1987), aff'd on other grounds, [**22] 842 F.2d 37 (2d Cir. 1988); see also United States v. Garth, 773 F.2d 1469, 1476 (5th Cir.), cert. denied, 476 U.S. 1140, 106 S. Ct. 2246, 90 L. Ed. 2d 693 (1986); United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). The court notes, in passing, that Alcan was one of 83 named defendants.

In sum, the cadmium, chromium, copper, lead and zinc which defendant admits were in its emulsion are hazardous substances under CERCLA--regardless of the form in which these metals were present and notwithstanding the very low levels of concentration--by virtue of their designation as toxic pollutants under the Clean Water Act and their appearance on the Table 302.4 List of Hazardous Substances. In the court's view, the statutory language is clear, rendering resort to legislative history, which in any way comports with the

court's understanding of the statutory scheme, see S. Rep. No. 848, 96th Cong., 2d Sess. 24-27 (1980) ("Substances listed as hazardous or toxic under certain other Federal laws are incorporated by reference and upon enactment of this bill such substances become statutorily defined as hazardous substances for the purposes of this bill. And the release of any of them or any constituent of them [**23] invokes the . . . response provisions and any costs of removal or remedial action or any damages are subject to the liability provision of the bill."), entirely unnecessary, see United States v. Monsanto, 858 F.2d at 167 n. 10. Needless to say the court agrees with the overwhelming body of case law that has confronted the issue presented here.

Hazardous substances, released by defendant, were present at the PAS site, and the government responded by cleaning up the site, see Declaration of Raymond E. Lupe with RI/FS attached as exhibit (establishing a nexus between defendant's release of the hazardous substances at the PAS site and the government's response thereto); defendant has not established any of the limited statutory defenses and its constitutional challenges are without merit. Accordingly, plaintiffs are entitled to summary judgment as to defendants' liability. The court now turns its attention to the matter of recovery of response costs.

B. Recovery of incurred costs

Under section 9607(a), Alcan is liable for "all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan[.]" 42 [**24] U.S.C. § 9607(a)(4)(A); 40 C.F.R. §§ 300.1-300.71 (1989) (national contingency plan) (promulgated pursuant to 42 U.S.C. § 9605). The burden lies with the defendant to demonstrate that the costs incurred by the respective

governments were inconsistent with the national contingency plan. See United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726, 746 (8th Cir. 1986), cert. denied, 484 U.S. 848, 98 L. Ed. 2d 102, 108 S. Ct. 146 (1987); City of [*541] Philadelphia v. Stepan Chemical Co., 713 F. Supp. 1484, 1486 (E.D.Pa. 1989). In the present case, plaintiffs seek to recover the difference between the stipulated amount of costs incurred through April 1, 1987 ($ 12,319,551.04) and the amount already recovered pursuant to the partial consent decree ($ 9,105,308.17) plus costs incurred since April 1, 1987 (some $ 710,635.17 by the United States and a net figure of $ 124,174 by the State of New York). Additionally, plaintiffs seek a declaration that Alcan is liable to both plaintiffs for future response costs associated with the PAS site and for prejudgment interest.

In view of the statutory provisions defining the terms "remove" and "removal," see 42 U.S.C. § 9601(23), "remedy" and "remedial [**25] action," see id. § 9601(24), "respond" and "response," see id. § 9601(25), remedial or removal action, for which the federal and state governments are entitled to recover from the party found liable, necessarily includes such activities as (a) investigations, monitoring and testing to identify the extent of danger to public health or welfare or the environment, (b) investigations, monitoring and testing to identify the extent of the release of hazardous substances, and (c) planning and implementation of a response action; also recoverable are "indirect" costs associated with the foregoing and with enforcement of the provisions of CERCLA, including administrative costs incurred by the staffs of the regulatory agencies involved and for the Department of Justice. See United States v. Northeastern Pharmaceutical and Chemical Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984), aff'd in part and rev'd in

part on other grounds, 810 F.2d 726 (8th Cir. 1986); see also United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1501-1504 (6th Cir. 1989) (litigation and administrative costs recoverable including a proportionate share of indirect costs associated with cleanup operations), [**26] cert. denied, 494 U.S. 1057, 108 L. Ed. 2d 767, 110 S. Ct. 1527 (1990); State of New York v. Shore Realty Corp., 759 F.2d at 1043 (response costs include costs in assessing the conditions of the site); United States v. Hardage, 733 F. Supp. 1424, 1431-1432 (W.D. Okla. 1989); City of New York v. Exxon Corp., 633 F. Supp. 609 (S.D.N.Y. 1986) (recoverable costs include costs of collecting and analyzing ground water samples, hydrogeological studies and remediation study); State of New York v. General Electric Co., 592 F. Supp. 291, 298 (N.D.N.Y. 1984); United States v. Wade, 577 F. Supp. 1326, 1333 n. 4 (E.D. Pa. 1983).

Defendant does not challenge the legality of any of the costs plaintiffs seek to recover; that is, defendant does not argue that the costs which plaintiff seeks to recover are not within the scope of the pertinent statutory provisions. And, ample documentation of the costs, direct and indirect, incurred by the EPA, the Department of Justice and the State of New York has been submitted to the court. Defendant's opposition to plaintiffs' summary judgment motion on incurred costs, aside from blanket denials to assertions of fact, is essentially three-fold: (1) plaintiffs have not demonstrated [**27] that any of the claimed costs were associated with metals contamination and it has not so stipulated; (2) discovery is needed for it to respond to the costs incurred since April 1, 1987; and (3) its liability is severable. None of these arguments has merit. The court will address the severability argument first.

Alcan rather summarily contends that it cannot be held jointly and severally liable because the harm caused by it is severable. In this regard, Alcan points out that whatever harm its hazardous substances may have caused would be limited to soil contamination, but, because the EPA's RI/FS appears to indicate that the concentration of metals in the soil was not high enough to warrant concern, "no remediation of soils was necessary [and] the harm from metal is clearly divisible." Alcan's Memo of Law at 29. Only, brief comment is called for. First, defendant bears the burden of proof on the issue of severability, see O'Neil, 883 F.2d at 178-179; United States v. Monsanto, 858 F.2d at 171, and it has not demonstrated entitlement to judgment as a matter of law on this issue; second, the record amply demonstrates that the [*542] harm inflicted at the site was indivisible because [**28] the contaminants found in the soil and the water were commingled, see Declaration of Raymond E. Lupe; Declaration of Eugene Meyer; and third, defendant has, in fact, confused divisibility of costs (irrelevant) with divisibility of environmental harm, see, e.g., United States v. R.W. Meyer, Inc., 889 F.2d at 1507; O'Neil, 883 F.2d at 178-183; United States v. Monsanto, 858 F.2d at 171 n. 22. Congress, it bears noting, has acted to help ameliorate the potential harshness resulting from a determination that a defendant's liability is joint and several by enacting a right of action for contribution. See 42 U.S.C. § 9613(f) (Supp. 1990); see also United States v. Western Processing Co., 734 F. Supp. at 938.

Alcan's argument that plaintiffs have failed to demonstrate that any of the costs incurred were associated with metals contamination can be viewed as a challenge to the appropriateness of a portion of plaintiffs' response (i.e., that there was no contamination from metals), as a challenge to plaintiffs' response generally (i.e., that, if there was contamination

from metals, plaintiffs have not itemized this expense), or as an argument that a nexus must be demonstrated [**29] between the response and an individual generator's contamination. However viewed, defendant's argument has no merit.

All that section 9607(a) requires is that there be a release or threatened release of a hazardous substance which causes the incurrence of response costs in order for a statutorily-defined generator of a hazardous substance to be held liable for all costs incurred so long as such costs are not inconsistent with the National Contigency Plan. 42 U.S.C. § 9607(a)(4)(A). As an initial matter, there is absolutely no requirement that a plaintiff demonstrate a causal nexus between a defendant's conduct and the contamination of the property involved. See, e.g., Dedham Water Co., 889 F.2d at 1152-1154. What appears to be required, at most, is that the plaintiff demonstrate some relationship between the release and a response. In this regard, the court notes that a release of hazardous substances occurred to which the government responded. Under the statute, then, the requisite nexus has been established. There is room, perhaps, to argue that a particular expenditure should not be included under the umbrella of "remedial action" because it is not sufficiently related [**30] to the release of the hazardous substances, but as noted defendant has not so challenged any of the claimed expenditures, and in any event the court is of the view that plaintiffs have amply demonstrated the relatedness of the direct and indirect expenditures of funds.

Additionally, defendant has not argued, much less demonstrated, that the plaintiffs' response to the presence of hazardous substance at the site was inconsistent with the national contingency plan, see Northeastern Pharmaceutical and Chemical Co., 810 F.2d at 747, that is, that the governments' choices of response actions were

arbitrary and capricious, see id. at 748. It is not open to the defendant to challenge the response undertaken by the government as "unreasonable". See id. at 748. There is no doubt that Alcan's emulsion brought to the PAS facility contained the metals subsequently found at the site. The contaminants were found in the soil and the water and were commingled. Moreover, it bears emphasizing that the government need not trace releases of hazardous substances to a particular defendant; it is sufficient if the site contains hazardous substances found in the defendant's wastes which were [**31] dumped at that site. See City of New York v. Exxon Corporation, 744 F. Supp. at 480 n. 10; United States v. Western Processing Co., 734 F. Supp. at 936; United States v. Marisol, 725 F. Supp. 833, 840 (M.D. Pa. 1989); United States v. Wade, 577 F. Supp. at 1333. Interestingly, defendant does not challenge the response to the groundwater contamination; nor does defendant argue that the surficial remedy did not clean up contaminants in the soil of the kind it contributed to the site. Its argument really is that the soil did not have to be cleaned up because the contaminants were not in a sufficiently high concentration to warrant the response. [*543] The court's response to this last argument is two-fold: the United States or the State of New York should not have to wait until the problem becomes worse by the addition of other generators' hazardous substances; and the statute contemplates the recovery of costs associated with the clean-up of hazardous substances present in an area. Underlying defendant's argument, then, is the view that there was no contamination of the soil because concentration levels were low. The statute indicates otherwise.

The court notes that defendant has [**32] not offered any evidence to raise a genuine dispute of fact regarding the specific dollars amounts claimed. Also, as for a response to plaintiffs' incurred costs since April 1, 1987, defendant, as plaintiffs point out, has not demonstrated

its entitlement to relief under Rule 56(f)--simply put, defendant has not explained what efforts were made at obtaining discovery and why those efforts were unsuccessful; moreover, discovery closed as of November 30, 1989; apparently, defendant never bothered with discovery regarding costs incurred after April 1, 1987.

Accordingly, defendant having failed to establish that the governments' response costs were inconsistent with the National Contingency Plan, all the incurred costs are conclusively presumed reasonable, see Northeastern Pharmaceutical and Chemical Co., 810 F.2d at 748, and plaintiffs are thereby entitled to recover the difference between the stipulated amount of costs incurred through April 1, 1987 ($ 12,319,551.04) and the amount already recovered pursuant to the partial consent decree ($ 9,105,308.17) plus costs incurred since April 1, 1987 (some $ 710,635.17 by the United States and a net figure of $ 124,174 by the State of [**33] New York).

Additionally, in recognition of the ongoing nature of response costs, pursuant to the authority granted the court under 42 U.S.C. § 9613(g)(2) (Supp. 1990), the court enters a declaratory judgment in plaintiffs' favor that defendant is liable to plaintiffs for future response costs associated with the PAS site "which will be binding on any subsequent action or actions to recover further response costs". Both plaintiffs are also entitled to recover prejudgment interest under 42 U.S.C. § 9607(a) (Supp. 1990) on the total response costs recovered by each of them. As requested by plaintiffs, they are granted leave to file declarations, within 20 days of the date of this memorandum-decision, setting forth the amount of such interest supported by the appropriate computations. Defendant will be allowed 10 days after such declarations are filed with the court to submit a response in opposition thereto if defendant feels the need to do so.

C. Cornell University's liability

As a protective measure, to hopefully ameliorate the potentially harsh effects of a judgment against it, Alcan commenced a third-party action naming Cornell University as defendant. By this third-party action, [**34] Alcan seeks a declaration that Cornell is jointly and severally liable for the response costs incurred by the United States and the State of New York relative to the PAS site and an order directing Cornell to contribute its fair share. According to the third-party complaint, Cornell has contributed waste to the PAS site in the form of processed coal pile leachate which contains compounds composed of materials of the same character but of greater concentration than the waste contributed by Alcan. Cornell answered the third-party pleading, denying certain allegations and asserting eight affirmative defenses. Alcan has moved for summary judgment against Cornell on the basis that Cornell sent treated coal pile leachate containing certain amounts of chromium, copper and zinc to the PAS site. In response, Cornell has cross-moved for summary judgment dismissing the third-party complaint essentially on the ground that, because the EPA decided not to name it as a potentially responsible party in the main lawsuit, Cornell is not a party from whom Alcan may seek contribution.

In 1986, Congress enacted the Superfund Amendments and Reauthorization Act, legislation initially prompted by concern [**35] over the joint and several liability rule that had been judicially-grafted on to CERCLA. [*544] See O'Neil, 883 F.2d at 179. Although Congress decided not to add a provision explicitly dealing with the matter of joint and several liability, see United States v. Monsanto, 858 F.2d at 171 n. 23, it did add two important provisions designed to mitigate the harshness of such liability. The first directs the EPA to offer early settlements to defendants who the

agency believes are responsible for only a small portion of the harm, so-called de minimus settlements. See O'Neil, 883 F.2d at 179; 42 U.S.C. § 9622(g) (Supp. 1990). The second creates a statutory cause of action for contribution, codifying what most courts had concluded was implicit in CERCLA as enacted in 1980. See O'Neil, 883 F.2d at 179 (noting in passing that, "while a right of contribution undoubtedly softens the blow where parties cannot prove that the harm is divisible, it is not a complete panacea since it frequently will be difficult for defendants to locate a sufficient number of additional solvent parties."); 42 U.S.C. § 9613(f) (Supp. 1990).

In part, section 9613(f) provides as follows:

> Any person may [**36] seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under . . . section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

42 U.S.C. § 9613(f)(1). Alcan does not expressly state what equitable factors ought to be considered by the court; underlying its motion, however, is the argument that, since Cornell contributed metals to the PAS site which were the same as those contributed by it and which were identified by EPA and judicially determined by the court to be hazardous substances, fairness requires that Cornell shoulder some of the financial burden. For its part, Cornell admits that it "sent treated coal pile run off to the PAS site," Attorney Thomas Mead Santoro's Affid. at para. 4, but that it should not be held jointly and severally liable because, by being removed from the list of potentially responsible parties (PRP) just

before commencement of the main action, its liability has been resolved. (The court notes that initially Alcan had also [**37] been dropped from the list; Alcan was "placed back on the list apparently after the EPA discovered some documents that suggested that Alcan's emulsion was E.P. toxic." Alcan's Response to Cornell's Cross Motion at 4 n. 1.) Cornell asserts that "the last waste-in list prepared for PAS provided to Cornell before its removal from the list of PRP's by the EPA [in March 1986] discloses a volume which, if it had been considered hazardous by the EPA, would have made Cornell a de minimus contributor (i.e. less than 1%)." Attorney Thomas Mead Santoro's Affid. at para. 5. As support for its argument that it has resolved its liability with the EPA and, therefore, may not, or should not, be held liable for contribution, Cornell relies on 42 U.S.C. §§ 9613(f)(2) and 9622(g). A careful reading of these two sections reveals quite readily that Cornell's reliance on them is sorely misplaced.

Section 9613(f)(2) provides that

> a person who has resolved its liability to the United States . . . in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially [**38] liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Section 9622(g), relating to de minimus settlements, provides in part as follows:

> (1) Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative

> or civil action under section . . . 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, [certain other conditions are met][.] . . . .
>
> [*545] (4) A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. . . . . (5) A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement.

42 U.S.C. § 9622(g)(1), (4), and (5) (Supp. 1990). Suffice it to say that no settlement was entered into at the administrative or judicial level between Cornell and the United [**39] States; Cornell was merely dropped as a potentially responsible party; in other words, the United States chose, for whatever reasons and in its discretion, not to pursue any legal action against Cornell. As such, Cornell's liability has not been resolved within the meaning of the foregoing statutes.

Cornell's cross motion, then, rises or falls based on the application of equitable factors deemed appropriate. Cornell's argument in this regard is tortured. First it argues that it would be unfair for the court to subject it to liability because it never had the opportunity to participate in the judicial settlement, having been "relieved" from responsibility prior thereto, but then argues that, because its responsibility has been determined to be less than that of certain de minimus parties, its liability can, at most, be less than that paid by the de minimus parties. Suffice it to say that Cornell's cross motion must be denied. In the court's view, there is no question that Alcan is entitled to summary judgment on its motion to the extent of

declaring that Cornell University is liable for contribution. The amount for which Cornell is liable is, however, another matter. A hearing [**40] needs to be held to determine its fair share.

Conclusion

For the reasons stated above, plaintiffs' motions for summary judgment are granted in their entirety. In short, plaintiffs are entitled to recover from defendant the response costs sought by them, with prejudgment interest thereon to be calculated by plaintiffs and subject to review and acceptance by the court, and to a declaration that defendant is liable for future response costs. Defendant's motion for summary judgment seeking a declaration that third-party defendant Cornell University is jointly and severally liable for the response costs incurred by the governments relative to the PAS site is also granted; a hearing is necessary, however, to determine the extent of Cornell's fair share unless, of course, Alcan and Cornell resolve the matter themselves. The Clerk is directed to enter judgment accordingly which judgment shall thereafter be amended to include the appropriate interest.

96 F.3d 1434

UNITED STATES OF AMERICA, Appellee V. ALCAN ALUMINUM CORP.; BASF CORP.; BEAZER MATERIALS AND SERVICES, INC.; BORG-WARNER CORP.; CARRIER CORP.; CHEMICAL LEAMAN TANK LINES CO.; CHEMICAL MANAGEMENT, INC.; CHRYSLER MOTORS CORP.; DANA CORP; DART INDUSTRIES, INC.; EXXON CORP.; FORD MOTOR COMPANY, GOULDS PUMPS, INC.; HITCHCOCK GAS ENGINE COMPANY, INC.; INGERSOLL-RAND; NEAPCO, INC.; ROME STRIP STEEL CO., INC.; STANLEY WORKS, INC.; TRW INC.; UNITED TECHNOLOGIES; ALCAN ALUMINUM CORPORATION, Appellant

No. 95-7570

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

96 F.3d 1434; 1996 U.S. App. LEXIS 24590

August 7, 1996, Argued

August 22, 1996, DATED

NOTICE: [*1] RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY. ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA. (D.C. Civil No. 89-01657). District Judge: Hon. Thomas 1. Vanaskie.

JUDGES: Before: NYGAARD, LEWIS AND MCKEE, Circuit Judges,

OPINION BY: Richard L. Nygaard

OPINION: Affirmed.

A-103

THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

No. 95-7570

UNITED STATES OF AMERICA,

Appellee

V.

ALCAN ALUMINUM CORP.; BASF CORP.; BEAZER MATERIALS AND SERVICES, INC.; BORG-WARNER CORP.; CARRIER CORP.; CHEMICAL LEAMAN TANK LINES CO.; CHEMICAL MANAGEMENT, INC.; CHRYSLER MOTORS CORP.; DANA CORP; DART INDUSTRIES, INC.; EXXON CORP.; FORD MOTOR COMPANY, GOULDS PUMPS, INC.; HITCHCOCK GAS ENGINE COMPANY, INC.; INGERSOLL-RAND; NEAPCO, INC.; ROME STRIP STEEL CO., INC.; STANLEY WORKS, INC.; TRW INC.; UNITED TECHNOLOGIES;

ALCAN ALUMINUM CORPORATION,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 89-01657)
District Judge: Hon. Thomas I. Vanaskie

Argued August 7, 1996

Before: NYGAARD, LEWIS AND MCKEE,
Circuit Judges,

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court entered October 4, 1995 be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT

/s/ Circuit Judge

ATTEST:

/s/ P. DOUGLAS SISK, CLERK

DATED: AUG. 22, 1996

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7570

UNITED STATES OF AMERICA,

Appellee

V.

ALCAN ALUMINUM CORP.; BASF CORP.; BEAZER MATERIALS AND SERVICES, INC.; BORG-WARNER CORP.; CARRIER CORP.; CHEMICAL LEAMAN TANK LINES CO.; CHEMICAL MANAGEMENT, INC.; CHRYSLER MOTORS CORP.; DANA CORP; DART INDUSTRIES, INC.; EXXON CORP.; FORD MOTOR COMPANY, GOULDS PUMPS, INC.; HITCHCOCK GAS ENGINE COMPANY, INC.; INGERSOLL-RAND; NEAPCO, INC.; ROME STRIP STEEL CO., INC.; STANLEY WORKS, INC.; TRW INC.; UNITED TECHNOLOGIES;

ALCAN ALUMINUM CORPORATION,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 89-01657)

District Judge: Hon. Thomas I. Vanaskie

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and MCKEE, Circuit Judges

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Before the Court is the Appellants Motion to Amend their Petition for Rehearing En Banc filed October 24, 1996,[1] and a Petition for Rehearing En Banc. The motion to amend the petition is hereby GRANTED. The petition for rehearing filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing as amended is DENIED.

By the Court,

/s/Circuit Judge

DATED: DEC 16 1996

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[1] The original petition filed by the Appellants contained references to certain counsel as "The Honorable" which we viewed as a highly improper attempt to invoke their former roles as members of the judiciary.

A-107

96 F.3d 1434

United States of America,

v.

Alcan Aluminum Corp., BASF Corp., Beazer Materials and Services, Inc., Borg-Warner Corp., Carrier Corp., Chemical Leaman Tank Lines Co., Chemical Management, Inc., Chrysler Motors Corp., Dana Corp., Dart Industries, Inc., Exxon Corp., Ford Motor Company, Goulds Pumps, Inc., Hitchcock Gas Engine Co., Ingersoll-Rand, Neapco, Inc., Rome Strip Steel Co.,

NO. 95-7570

United States Court of Appeals,
Third Circuit.

Aug 22, 1996

Appeal From: M.D.Pa.,
Vanaskie, J.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

U.S.A.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 83-2501 JMI
	)	
J.B. STRINGFELLOW, et al.,	)	
	)	
Defendants.	)	
	)	
AND RELATED COUNTER-CLAIMS AND THIRD-PARTY COMPLAINTS.	)	

THE HONORABLE HARRY V. PEETRIS

Special Master, U.S. District Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Wednesday, November 13, 1996

REPORTER'S TRANSCRIPT OF PROCEEDINGS, taken on behalf of the Court, at 6222 Wilshire Boulevard, Suite 205, Los Angeles, California, commencing at 10:15 a.m., on Wednesday, November 13, 1996, before LAURIE HELD-BIEHL, Certified Shorthand Reporter No. 6781.

* * *

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* * *

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* * *

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* * *

Los Angeles, California, Wednesday, November 13, 1996, 10:15 a.m.

THE CLERK: Please remain seated and come to order. This United States District Court is now in session, the Honorable Harry V. Peetris, Special Master, presiding.

THE COURT: Morning.

THE CLERK: Item number 1 on the calendar, CV 83-2501 JMI, United States versus J.B. Stringfellow, Jr., et al. The appearances of counsel have already been noted for the record.

* * *

[Page 61 of Transcript)

THE COURT: You know, you're touching on exactly what the Supreme Court didn't want to comment on, is that in order to get legislation passed--

MR. MULLIKEN: Yes.

THE COURT: -- and get it by the public --

MR. MULLIKEN: Yes.

THE COURT: -- they can't say what they're doing; so they have to drop the term in order to get it signed.

MR. MULLIKEN: Yes.

THE COURT: Because if the term is in there, then it will never pass muster. But then what the courts have been doing is, being realistic, knowing Congress is doing that, what did Congress intend? And they look at these things.

Now we're going to throw out legislative -- and the Supreme Court wants the courts to throw out history, purpose and go down the line.

MR. MULLIKEN: Yes.

THE COURT: None of them count in determining what the statute means. Do they really mean that? Are they going to apply that across the board to all the legions of cases that have been all interpreted by--

* * *

[Page 62 of Transcript)

--courts, including the Supreme Court? Are they going to go through their roster and redo all of their opinions again?

I mean, it sounds great to say we don't look at legislative history. Well, if you're not going to look at those things, how are you going to interpret what Congress means? Congress doesn't put legal labels on the things they're doing because the public won't digest it.

It's like Medicare, what they're doing to Medicare. I mean, they have thousands of people scared about it and it's ludicrous; so the courts have to be realistic when they're looking there.

* * *

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MR. SALIBRA: If it please the Court, we adopt and accept pretty much what Mr. Mulliken said except I think we take a somewhat sharper perspective to the last question that this Court asked. And that is, what did Congress, what did the Supreme Court intend to do when they came down with this argument, Landgraf? And I say they intended to do exactly what they said.

The reason Landgraf is here, your Honor, is not because, under the federal rules, there is a provision that says if the courts are doing what we want, we're going to take a case and become a cheering section and say, "Guys, you're doing a great job, keep doing it." They took this case because what the courts were doing wasn't a great job and they wanted to change it.

Now, you asked the question, let me answer it directly. Did they expect us to stop looking at legislative history? Yes. That's what they said. Why? For a very simple reason.

Now, Mr. Brooks accuses us in our brief and he says Alcan adds this section about cost benefit analysis. When you look at Landgraf, it says why it's there. It says policy decisions aren't the function of the court, they're the function of Congress, you

* * *

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see. If the Congress, for political reasons, doesn't want to make a decision, then the decision doesn't get made and it doesn't get made by the courts.

Now, that's not a novel notion. For a long time in this court, the Court has expressed the notion that we are not going to legislate for the Congress. It is their job and it is our job to do something different.

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 83. COURTS OF APPEALS

28 USCS § 1291 (1996)

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 81. SUPREME COURT

28 USCS § 1254 (1996)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

28 USCS § 1345 (1996)

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

* * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY

HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

42 USCS § 9613 (1996)

§ 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia. Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue. Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

* * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 103. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY

HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

42 USCS § 9601 (1996)

§ 9601. Definitions

For purposes of this title [42 USCS §§ 9601 et seq.]--

(1) The term "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(2) The term "Administrator" means the Administrator of the United States Environmental Protection Agency.

(3) The term "barrel" means forty-two United States gallons at sixty degrees Fahrenheit.

(4) The term "claim" means a demand in writing for a sum certain.

(5) The term "claimant" means any person who presents a claim for compensation under this Act.

(6) The term "damages" means damages for injury or loss of natural resources as set forth in section 107(a) or 111(b) of this Act [42 USCS § 9607(a) or 9611(b)].

(7) The term "drinking water supply" means any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act, or as drinking water by one or more individuals.

(8) The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 USCS §§ 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(9) The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

(10) The term "federally permitted release" means (A) discharges in compliance with a permit under section 402 of the Federal Water Pollution Control Act [33 USCS § 1342], (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 402 of the Federal Water Pollution Control Act [33 USCS § 1342] and subject to a condition of such permit, (C) continuous or

anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the Federal Water Pollution Control Act [33 USCS § 1342], which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 404 of the Federal Water Pollution Control Act [33 USCS § 1344] (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 USCS § 6925(a)-(d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 102 of [or] section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 [33 USCS § 1412 or 1413], (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act [42 USCS §§ 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111, section 112, title I part C, title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 USCS §§ 7411, 7412, 7470 et seq., 7501 et seq., or 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other

materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 307(b) or (c) of the Clean Water Act [33 USCS § 1317(b) or (c)] and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 402 of such Act [33 USCS § 1342], and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 USCS §§ 2011 et seq.], in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954 [42 USCS §§ 2011 et seq.].

(11) The term "Fund" or "Trust Fund" means the Hazardous Substance Superfund established by section 9507 of the Internal Revenue Code of 1986 [26 USCS § 9507].

(12) The term "ground water" means water in a saturated zone or stratum beneath the surface of land or water.

(13) The term "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this Act.

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 USCS § 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of this Act [42 USCS § 9602], (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 USCS § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 USCS § 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 USCS § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 USCS § 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

(15) The term "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas.

* * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 103. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY

HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

42 U.S.C. § 9607 (1996)

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of

response costs, of a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USCS § 9604(i)].

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 USCS §§ 9501 et seq.]. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses. There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by--

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts.

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed--

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $ 300 per gross ton, or $ 5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $ 300 per gross ton, or $ 500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of title 49, United States Code), or rolling stock, $ 50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $ 5,000,000 (or, for releases of hazardous substances as defined in section 101(14)(A) of this title [42 USCS §§ 9601(14)(A)] into the navigable waters, $ 8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $ 50,000,000 for any damages under this title [42 USCS §§ 9601 et seq.].

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such

person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of title 49 of the United States Code or vessels subject to the provisions of title 33 or 46 of the United States Code, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act [42 USCS § 9604 or 9606], such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 112(c) of this Act [42 USCS §§ 9612(c)]. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Rendering care or advice.

(1) In general. Except as provided in paragraph (2), no person shall be liable under this title [42 USCS §§ 9601 et seq.] for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the

National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments. No State or local government shall be liable under this title [42 USCS §§ 9601 et seq.] for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision. This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights.

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to

insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this title [42 USCS §§ 9601 et seq.], including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Natural resources liability; designation of public trustees of natural resources.

(1) Natural resources liability. In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: Provided, however, That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a), where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to

an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this Act for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource [.] There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act [enacted Dec. 11, 1980].

(2) Designation of federal and state officials.

(A) Federal. The President shall designate in the National Contingency Plan published under section 105 of this Act [42 USCS § 9605] the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act and section 311 of the Federal Water Pollution Control Act [33 USCS § 1321]. Such officials shall assess damages for injury

to, destruction of, or loss of natural resources for purposes of this Act and such section 311 [33 USCS § 1321] for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State. The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this Act and section 311 of the Federal Water Pollution Control Act [33 USCS § 1321] and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this Act and such section 311 [33 USCS § 1321] for those natural resources under their trusteeship.

(C) Rebuttable presumption. Any determination or assessment of damages to natural resources for the purposes of this Act and section 311 of the Federal Water Pollution Control Act [33 USCS § 1321] made by a Federal or State trustee in accordance with the regulations promulgated under section 301(c) of this Act [42 USCS § 9651(c)] shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act or section 311 of the Federal Water Pollution Control Act [33 USCS § 1321].

(g) Federal agencies. For provisions relating to Federal agencies, see section 120 of this Act [42 USCS § 9620].

(h) Owner or operator of vessel. The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided

under section 114 of this Act [42 USCS § 9614] notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) or the absence of any physical damage to the proprietary interest of the claimant.

(i) Application of registered pesticide product. No person (including the United States or any State or Indian tribe) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 USCS §§ 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release. Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 101(10)(B) or (C) [42 USCS § 9601(10)(B) or (C)] shall be recoverable in

an action brought under section 309(b) of the Clean Water Act [33 USCS § 1319(b)].

(k) Transfer to, and assumption by, Post-closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc., monitoring costs; reports.

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act [42 USCS § 6921 et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 232 of this Act [42 USCS § 9641] when--

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 USCS §§ 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility

notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act) [42 USCS § 6926(b)] that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 232 of this Act [42 USCS § 9641], and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 232 of this Act [42 USCS § 9641] may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 USCS §§ 6921 et seq.] for hazardous waste disposal facilities

meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after the date of enactment of this Act [enacted Dec. 11, 1980], the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in title II of this Act.

(B) Not later than eighteen months after the date of enactment of this Act [enacted Dec. 11, 1980] and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the

President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this Act and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under title II of this Act.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) Suspension of liability transfer. Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 111 of this Act [42 USCS § 9611(j)], no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund established by section 232 of this Act prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) Study of options for post-closure program.

(A) Study. The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their

closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the protection of human health and the environment.

(B) Program elements. The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and close such facilities in a manner which assures protection of human health and the environment.

(C) Assessments. The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act [42 USCS § 6925] and the likelihood of future insolvency on the part of owners and operators of such facilities. Separate assessments shall be made for different classes of facilities and for different

classes of land disposal facilities and shall include but not be limited to--

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) Procedures. In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) Consideration of options. In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (B) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to--

(i) revisions to closure, post-closure, and financial responsibility requirements under subtitles C and I of

the Solid Waste Disposal Act [42 USCS §§ 6921 et seq. and 6991 et seq.];

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 232 of this Act, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) Recommendations. The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appropriate committees of Congress for additional authority to implement such program.

(l) Federal Lien.

(1) In general. All costs and damages for which a person is liable to the United States under subsection

(a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a)) shall constitute a lien in favor of the United States upon all real property and rights to such property which--

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration. The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this Act.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113 [42 USCS § 9613].

(3) Notice and validity. The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien

imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of the Internal Revenue Code of 1954 [26 USCS § 6323(h)].

(4) Action in rem. The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) Maritime lien. All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

Supreme Court, U.S.
FILED
APR 9 1997

No. 96-1494

IN THE

Supreme Court Of The United States

October Term, 1996

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, BEAZER MATERIALS AND SERVICES, INC., CARRIER CORPORATION, EXXON CORPORATION, FORD MOTOR COMPANY, ROME STRIP STEEL COMPANY, INC., THE STANLEY WORKS, AND UNITED TECHNOLOGIES CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF BEAZER MATERIALS AND SERVICES, INC. (N/K/A BEAZER EAST, INC.), EXXON CORPORATION AND FORD MOTOR COMPANY

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QUESTION PRESENTED

I. Whether this Court should grant certiorari, vacate the judgment below, and remand the case to the Third Circuit to determine, in light of this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which intervened between *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3rd Cir. 1992)(*"Alcan I"*) and *United States v. Alcan Aluminum Corp.*, 96 F.3d 1434 (3rd Cir. 1996) (*"Alcan II"*), whether Section 107(a)(3) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9607(a)(3) should be construed to create retroactive liability for a party that "arranged for disposal" prior to the date of CERCLA's adoption.

PARTIES AND RULE 29.6 STATEMENT

The parties whose counsel appeared in the most recent Third Circuit proceeding were the United States of America, Alcan Aluminum Corporation, Beazer Materials and Services, Inc. (n/k/a Beazer East, Inc.), Carrier Corporation, Exxon Corporation, Ford Motor Company, Rome Strip Steel Company, Inc., The Stanley Works, and United Technologies Corporation.

List of Parent Companies and Nonwholly Owned Subsidiaries

The parent company of Beazer Materials and Services, Inc. (n/k/a Beazer East, Inc.) is Hanson PLC. Beazer Materials and Services, Inc. has no nonwholly owned subsidiaries.

Exxon Corporation has no parent company. Its nonwholly owned subsidiaries are: Compania Minera Disputada de Las Condes S.A.; Esso Malaysia Berhad; Esso Societe Anonyme Francaise; General Sekiyu K.K.; Les Docks des Petroles d'Ambes; Imperial Oil Limited; Societe Francaise, Exxon Chemical; Tonen Kabushiki Kaisha.

Ford Motor Company has no parent company. Its nonwholly owned subsidiaries are: U.S.--Associates First Capital Corporation and Great Mall of the Bay Area Management Company; Argentina -- Invercred Compania Financiera S.A.; Australia -- Ford Motor Company of Australia Limited; Belgium -- Ford Credit N.V. and Ford Motor Company (Belgium) N.V.; Brazil -- Autolatina Comercio e Participacoes Financerias Ltd.; Denmark -- Ford Motor Company A/S; Finland -- Oy Ford Ab; Germany -- Ford Werke-Aktiengesellschaft; Holland -- Ford Nederland B.V.; Japan -- Mazda Motor Corporation; Korea -- Ford Motor Company of Korea; Netherlands -- Ford Credit B.V.; Norway -- Ford Motor Norge A.S.; New Zealand -- Ford Motor Company of New Zealand Limited; Singapore -- Ford Motor Company Private Limited; Switzerland -- Ford Motor Company (Switzerland) S.A.; Vietnam -- Ford Vietnam Limited. Only companies of which Ford has at least a 10% equity interest are listed; joint ventures are not included.

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CERCLA, Sections 101(32), 103(c), 107(a), 107(f), 113(b), 42 U.S.C. 9601(32), 9603(c), 9607(a), 9607(f), 9613(b); The Clean Water Act ("CWA"), Section 311(f), 33 U.S.C. 1321(f).

STATEMENT OF THE CASE

This Response is in partial support of the Petition for Writ of Certiorari by Petitioner Alcan Aluminum Corporation ("Alcan"). It is submitted on behalf of Respondents Beazer Materials and Services, Inc. (now known as Beazer East, Inc.), Exxon Corporation, and Ford Motor Company (hereafter the "Respondents") pursuant to Rule 12.6 of the Rules of the Supreme Court of the United States.

The Statement of the Case presented by Alcan does not include facts relevant to Question V. raised by Alcan and to the Question Presented by this Response (which is subsumed within Alcan's Question V.). Since we believe a fuller statement of the facts will aid in the disposition of this matter, we provide that statement here. Incorrect statements of fact in the Petition for the Writ of Certiorari which relate only to Questions I. through IV. of Alcan's Petition, which questions we do not otherwise address, are listed in a Summary of Incorrect Statements included in the Appendix to this Response.

From mid-1978 through late 1979, Alcan arranged for the disposal of an oily emulsion consisting of waste oil and water. *Alcan I*, 964 F.2d at 256, Pet. A-9.[1] Alcan's oily emulsion also included an emulsifier, Farbest B207 and B216A. J.A. 231-32. The oily emulsion was turned over to an oil recycler that collected oily liquid wastes from numerous companies located in the northeastern United States. *Alcan I*, 964 F.2d at 256, Pet. A-8-9.

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[1] We refer to the Appendix to the Petition for Writ of Certiorari as "Pet. A", and to the Joint Appendix in *Alcan II* as "J.A.".

The recycler disposed of Alcan's oily emulsion by depositing it into a borehole, in Pittston, Pennsylvania (the Pittston borehole) during the period mid-1978 through late 1979. J.A. 251-52. Oily wastes generated by other companies were also, without their knowledge, deposited by the recycler into the same Pittston borehole and commingled with Alcan's oily waste. *See Id.*; *Alcan I*, 964 F.2d at 256, Pet. A-8-9. The government has not alleged and there is no evidence that Alcan or any of the other companies that did business with the recycler knew of his unlawful activities. As noted below, the Department of Justice has characterized the depositing of oily wastes in 1979 into the Pittston borehole as the discharge of a hazardous substance into the environment. J.A. 309, 318.

In late July, 1979, an oily slick appeared on the Susquehanna River. It was later determined by the United States Environmental Protection Agency (EPA) that the materials had reached the River after migrating several miles, via a labyrinth of abandoned mine tunnels and shafts, from the Pittston borehole to a tunnel referred to as the Butler Tunnel. The tunnel drains many of the local mine tunnels and shafts in the area and empties into the Susquehanna River. *See* J.A. 152-55, 207; *Alcan I*, 964 F.2d at 255-56, Pet. A-6-10.

In December, 1980, Congress passed and the President signed the CERCLA statute. The statute has been construed to create strict liability (i.e, liability without fault) for several classes of persons. The class of persons that are included under Section 107(a)(3) are persons that "arranged for disposal" of a hazardous substance. Liability is imposed under CERCLA § 107(a) for costs incurred by the United States (among others) in responding to a release of hazardous substances into the environment. The response costs must be not inconsistent with the National Continency Plan. The statute contains no express provision that any of the potential liability created under it is to be applied retroactively to persons that lawfully "arranged for disposal" prior to the date of CERCLA's adoption. CERCLA does, however, provide that the

term "liable" or "liability" "shall be the construed to be the standard of liability which obtains" under Section 311 of the Clean Water Act, 33 U.S.C.§1321. CERCLA § 101 (32), 42 U.S.C. 9601(32).

In 1985, Hurricane Gloria accompanied by torrential rains struck the Pittston area. A second slick was reported on the Susquehanna. EPA attempted to deploy booms to contain the slick and subsequently cleaned up the banks of the river. J.A. 254.

In 1987, EPA entered into a Consent Order with the Respondents and with others to conduct a study of the Pittston borehole and the Butler Tunnel. J.A. 210. Alcan did not participate in that Consent Order or the study that followed.

In 1989, EPA brought the instant action to collect its response costs incurred in addressing the 1985 oil slick. J.A. 24, 208. EPA's response costs totaled approximately $1.3 million. Pet. A-54. In 1990, the Respondents and others settled with the Government by entering into Consent Decrees and paying $828,500. Alcan did not participate in the settlement.[2] The government continued to seek from Alcan the balance of its cleanup costs of $210,157.46, plus $176,510.09 in interest, and $87,122.63 in enforcement costs (for a total of $473,790.18). *United States v. Alcan Aluminum Corp.*, Civil No. 89-1657 (M.D. Pa., May 8, 1991) (Memorandum and Order of Judge Kosik). Alcan opposed the entry of the Consent Decrees between EPA and Respondents and others. After Alcan's objections were overruled, Alcan sought certification under F.R.C.P. 54(b) so as to appeal the entry of Respon-

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[2] Between 1987 and the present, Respondents and others have also spent more than $3 million conducting a study of the Butler Tunnel site under EPA's direction. As a result of that study EPA has selected a remedy for the Butler Tunnel site estimated by EPA to cost an additional $3.6 million. Thus, total costs at the Site are expected to be in the range of $6.6 million in addition to the $1.3 million involved in the cleanup. Alcan has paid nothing to date.

dents' decree. Certification was denied and Respondents continued as parties to these proceedings.

After a trial in the Middle District of Pennsylvania Alcan was held jointly and severally liable to the government under CERCLA § 107(a) for the balance of the past costs not recovered by the government from Respondents and others, plus interest totaling $473,790.18. *Alcan I*, 964 F.2d at 257, Pet. A-11. On appeal, Respondents participated since, as both a practical and legal matter, their rights would be affected by the outcome of Alcan's appeal. As noted above, there had been no Rule 54(b) certification of their settlement and their costs were continuing without contribution from Alcan.

In *Alcan I* the Third Circuit rejected the argument that there was any threshold concentration for a substance to be "hazardous" under CERCLA. *Id.* at 259-61, Pet. A-14-19. The Third Circuit also rejected Alcan's argument that its oily emulsion was not a hazardous substance or that it was exempt under the so-called petroleum exclusion from the definition of a hazardous substance under CERCLA. *Id.*

The Third Circuit noted, however, that CERCLA does not expressly provide for joint and several liability. Congress intended that whether there is any joint and several liability under CERCLA should be determined in accordance with the common law principles reflected in the Restatement of Torts, Sections 433A and 881. *Id.* at 268-69, Pet. A-32-36. Accordingly, the Third Circuit in *Alcan I* reversed and remanded the case for a determination as to whether joint and several liability should be imposed upon Alcan. *Id.* at 271, Pet. A-38. Consistent with Restatement principles, the Third Circuit in *Alcan I* noted that if Alcan could show a reasonable basis for apportionment of the harm, it would be liable only for the share of the harm it caused, and if it could show that it had not

contributed to the harm at all, it would be liable for nothing. *Id.*[3]

On remand the District Court held that Alcan had not shown that its oily emulsion, taken as a whole when commingled with other oily wastes, had not contributed at all to the harm (the oil slick), and that Alcan had not shown any reasonable basis of apportionment of the harm under Restatement principles "such as the percentage of the volume of total waste represented by Alcan's waste", Pet. A-52-53, "toxicity or migratory potential", or other factors Pet. A-65-66.

Alcan also urged that the discharge in 1985 was due to an "act of God" (Hurricane Gloria) and therefore subject to a defense from liability under CERCLA § 107(b). Pet. A-66-68. The government on oral argument urged that the Act of God defense did not apply since the discharge into the environment, which is a prerequisite for CERCLA liability, was complete when the dumping into the borehole occurred in 1979. J.A. 309, 318. The District Court rejected the "act of God" defense, albeit on other grounds. Pet. A-66-68.

Alcan applied to the District Court for reconsideration. The motion was denied on October 4, 1995 - the Court essentially adhering to its original position. Alcan appealed a second time to the United States Court of Appeals for the Third Circuit, in what we now refer to as *Alcan II*. While *Alcan II* was pending in the Third Circuit, the United States District Court for the Southern District of Alabama, in *United States*

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[3] At the conclusion of its opinion in *Alcan I* the Third Circuit referred to Alcan having to prove on remand that the hazardous substances in its emulsion caused no harm if it wanted to avoid all liability. 964 F. at 271, Pet. A-38. Earlier in the same section of its opinion, the Third Circuit referred to Alcan having to prove that its emulsion caused no harm if it wanted to avoid all liability. 964 F.2d at 270, Pet. A-37. The Restatement contains no definition of hazardous substances and no petroleum exclusion. It simply focuses on the cause of the harm. We assume this question will be addressed by the government which is also a Respondent on this Petition.

v. Olin Corp, 927 F. Supp. 1502 (S.D. Ala. 1996), ruled that since CERCLA contained no express provision for retroactive liability and there was no clear legislative intent to create retroactive liability, the presumption of prospective liability under *Landgraf* applied. The District Court in *Olin* dismissed the government's action for lack of subject matter jurisdiction.[4]

In the instant case, no claim against Alcan has been asserted by the government except under CERCLA § 107(a)(3), based on Alcan's having "arranged for disposal" prior to CERCLA's adoption. Additionally, as noted above, the government's position is that the discharge into the environment (the deposit of the oily wastes into the borehole) also took place in 1979, prior to CERCLA's adoption. Within two weeks after the *Olin* District Court's decision (which was the first widely reported District Court decision to apply *Landgraf* to CERCLA), Alcan moved in the Third Circuit to dismiss the government's case for lack of subject matter jurisdiction on *Landgraf* grounds. Thereafter, the Third Circuit allowed Respondents and the government to file supplemental briefs on the issue of retroactivity.

On August 22, 1996, the Third Circuit affirmed the District Court's decision without opinion. Pet. A-102-04. As Alcan contends in this Court, there was no ruling on the motion to dismiss for lack of subject matter jurisdiction (i.e., that on the undisputed facts, CERCLA is not applicable to arranging for disposal prior to CERCLA's adoption in 1980). The government did not deny that Alcan arranged for disposal before CERCLA's adoption or that the government sought the

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[4] The District Court in *Olin* also ruled that on the facts before it CERCLA exceeded Congress' authority under the commerce clause. That issue is not involved in the instant proceeding. Subsequent to the docketing of the Petition for Writ of Certiorari in the instant case, the United States Court of Appeals for the Eleventh Circuit reversed the District Court's decision. *United States v. Olin*, 1997 U.S.App. LEXIS 5488 (March 25, 1997).

imposition of retroactive liability. Thus, a basic question before the Third Circuit was whether it could affirm a judgment against Alcan based solely on CERCLA, without deciding on the undisputed facts if CERCLA applied to the conduct involved. The Third Circuit did not answer the question but merely affirmed without opinion the District Court's judgment that Alcan was jointly and severally liable under CERCLA.[5] The District Court, in turn, had not passed on the retroactivity issue since its focus on remand had been on whether Alcan had showed a reasonable basis for apportionment of the harm under the Restatement.

SUMMARY OF ARGUMENT

This Court's eight to one decision in *Landgraf*, which intervened between *Alcan I* and *Alcan II*, left uncertain whether the initial determination of Alcan's liability under CERCLA was (or was not) correct. In *Landgraf*, this Court refused to apply retroactively additional liability created as to a person that willfully "engaged in" discriminatory conduct since the conduct had occurred before the additional liability was created. This Court first clarified the definition of when liability is truly retroactive. Additionally, noting the unfairness of increasing liablity after a person has acted, this Court ruled that liability is presumed to be created prospectively. Retroactive liability will only be applied if the people's elected representatives have taken into account the unfairness of retroactive liability and clearly decided that the benefits outweigh the unfairness. The Court also ruled that even if the application of retroactive liability would further the purpose of a statute, that is not sufficient to overcome the presumption of prospective application. A section by section analysis of a statute is needed to determine whether Congress actually de-

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[5] As noted below, the government argued that the issue did not go to subject matter jurisdiction and, in any event, was raised late by Alcan. That issue was also briefed but not decided.

cided to create retroactive liability in the specific provision at issue. Since the instant case was pending on appeal after *Landgraf* was decided, the Third Circuit was obligated to apply *Landgraf* to the case. *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974); *see Landgraf* at 273-277.[6]

Thus, the question of whether CERCLA created retroactive liability for a party that lawfully "arranged for disposal" of wastes before CERCLA was adopted should have been answered by the Third Circuit in *Alcan II*. It was not. Accordingly, we believe this Court should grant certiorari, vacate the judgment below, and remand the case to the Third Circuit to determine, in light of this Court's decision in *Landgraf*, whether CERCLA Section 107(a)(3) should be construed to create retroactive liability for a person that lawfully "arranged for disposal" prior to the date of CERCLA's adoption. As of this date, only one Circuit has passed on the retroactivity of CERCLA after *Landgraf*, albeit in the context of a current property owner or owner at the time of disposal under Sections 107(a)(1) and 107(a)(2) of CERCLA. As noted below, liability under these subsections appears to present different retroactivity questions than claims under Section 107(a)(3) of CERCLA.

In our argument below, we will first review this Court's decision in *Landgraf*. Second, we will review the statutory language. The statute contains no statement that it is retroactive, and the statutory language related to the specific liability question is consistent with only prospective application as to persons that lawfully "arranged for disposal" prior to the adoption of the statute. Third, we will review the legislative history of CERCLA. In the House, an express retroactivity provision was stricken in committee. In the end, the House abandoned its own bill in favor of a last minute "compromise" bill crafted in the Senate that was silent on all of the "hot button" liability issues

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[6] Since *Landgraf* itself creates no new legal obligation for past conduct, the application of *Landgraf* to pending cases raises no retroactivity issue. *See Landgraf* 511 U.S. at 280.

that had prevented passage, including retroactive liability, joint and several liability, and strict liability. We will show that the legislative compromise that was struck was to avoid expressly dealing with any of those issues. Instead, the Senate compromised on incorporation by reference of the standard of liability of the Clean Water Act that had been in place since 1972. Each Senator put his own "spin" on what had been agreed to. No one said the compromise created retroactive liability. As noted below, the Clean Water Act is a quintessentially prospective statute. The House was presented with the Senate CERCLA bill on a "take it" or "leave it" basis, with no changes permitted. The House accepted the Senate version as presented. There was no Senate-House Conference Report. The only Senate Report is to an earlier version of the Senate Bill which its own sponsors admitted "cannot be enacted". Against this background, the presumption against retroactivity in *Landgraf* is dispositive.

The government can be expected to try to avoid sending the case back to the Third Circuit for a ruling on retroactivity by claiming the issue should have been presented prior to or during *Alcan I*. The problem is that *Landgraf* was not decided until almost two years after *Alcan I*. The government asserts that *Landgraf* changed nothing. As we shall show, that is simply not correct. The government also asserts that the issue is not jurisdictional. The government does not deny, however, that it has relied upon CERCLA for subject matter jurisdiction. A subject matter jurisdiction defense can be raised at any time. Moreover, even if retroactivity is considered to go to whether a cause of action is stated instead of to subject matter jurisdiction, any delay in raising the defense prior to *Alcan II* does not mandate its rejection - that is discretionary under Rule 12(h)(2) of the Federal Rules of Civil Procedure. The Third Circuit should at least be required to exercise its discretion.[7]

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[7] Rule 12(h)(1) mandates waiver for certain claims (lack of jurisdiction of the person, improper venue, etc.). Rule 12(h)(3) prohibits waiver for subject matter jurisdiction issues. Rule 12(h)(2) is an "intermediate"

ARGUMENT

The *Landgraf* Decision

In *Landgraf* the District Court found that the plaintiff had been sexually harassed in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and that the harassment was serious enough to establish that a hostile work environment existed for plaintiff, Landgraf. The employer transferred the employee doing the harassing. Plaintiff resigned shortly thereafter for reasons unrelated to the harassment she had experienced. 511 U.S. at 248. The only remedy provided by the 1964 Act for violation of Title VII at the time was equitable *(i.e.*, restoration in the form of back pay). Since plaintiff had resigned for reasons unrelated to the harassment, she was not eligible for that remedy. The District Court dismissed the action. While the case was pending on appeal, Congress effectively amended Title VII when it adopted the Civil Rights Act of 1991 (the "1991 Act"). The 1991 Act provided for compensatory damages and punitive damages against anyone "who engaged in" unlawful intentional discrimination in violation of Title VII of the Act. A right to trial by jury was provided for anyone seeking compensatory and punitive damages. The Court of Appeals declined to apply any of those provisions in the 1991 Act to the case. *Id.* at 249. This Court noted that " the controlling question is whether the Court of Appeals should have applied the law in effect at the time the

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category in which waiver is permissible but not mandatary. *Weaver v. Bowers*, 657 F.2d 1356, 1359-62 (3rd Cir. 1981), *cert denied,* 455 U.S. 942 (1982)(retroactivity issue considered notwithstanding failure to raise it below - "courts of appeals have inherent power to reach [Rule 12(h)(2)] issues although not timely raised below"). In the instant case, Respondent the United States, is seeking to have CERCLA apply retroactively to conduct that occurred before CERCLA was adopted, while using a claim of waiver to avoid having *Landgraf* apply to a CERCLA case still pending on appeal. As noted above, the Third Circuit did not rule on the motion to dismiss.

discriminatory conduct occurred, or at the time of its decision in July 1992." *Id.* at 250. This Court ruled that none of the referenced provisions of the 1991 Act applied and that the law that governed was the law in effect at the time of the conduct complained of. *Id.* at 286.

Landgraf did basically two things. First, it clarified and narrowed the definition of what constituted retroactive application of a new statute. A statute is not considered to have retroactive effect unless applying the change to past conduct "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. Second, as to those limited situations in which a statute will have retroactive effect as so defined, *Landgraf* "raised the bar". Emphasizing the fundamental unfairness of changing the rules after conduct was completed, this Court ruled that a statute would not be given retroactive effect unless it was clear that the people's elected representatives in Congress had considered the issue of retroactivity and decided that the benefits to be gained by retroactivity outweighed the unfairness. *Id.* at 270-73. This clear legislative decision may be manifest either on the face of the statute or in clear legislative history.[8]

Landgraf also teaches that it is not sufficient to look at general legislative purpose, since that does not tell where the compromise on achieving generalized objectives was struck. Nothing would have better furthered the overall legislative purpose of providing a remedy for those that were the victims of sexual discrimination than to apply the expansion of the

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[8] The concurring opinion in Landgraf would limit the inquiry to the face of the statute since that is the only thing on which the elected representatives actually vote and which the President signs. The tendency of various Congressmen and Senators to attempt to "pack" the legislative history with their own views, or those of various advocacy groups, is increasingly well known. 511 U.S. at 287 (Scalia, J., concurring).

remedies of Title VII retroactively. This Court rejected that approach and insisted on an examination of the specific provisions involved and a determination as to whether Congress clearly intended that those provisions create retroactive liability. *See Id.* at 280-85.

As will be shown below, many of the pre-*Landgraf* decisions (and some of the post-*Landgraf* decisions) that sustained retroactive CERCLA liability did so incorrectly on the basis that either retroactivity was not involved, or on the basis that judicially imposed retroactive liability was justified by Congress' broad remedial purpose to address abandoned dump sites. After *Landgraf* neither approach is tenable.

The government argued below that *Landgraf* really changed nothing. The above points indicate otherwise. This Court itself noted that prior to *Landgraf*,

> [o]ur precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance, and suggested that some provision might apply to cases arising before enactment while other might not. [citations omitted].

Id. at 261. After *Landgraf* there is no such doubt.

A Textual Analysis of CERCLA Indicates Congressional Intent to Apply Liability for Those That Lawfully Arranged for Disposal Prospectively Not Retroactively

Congress defined "liable" or "liability" in CERCLA as "the standard of liability which obtains under section 1321 of Title 33 [section 311 of the Clean Water Act]." CERCLA § 101(32), 42 U.S.C. § 9601(32). Section 311 sets up a system of penalties for unlawful discharges into waters of the United States, as well as cleanup obligations therefor. It is a quintessentially prospective statute. Typically, discharge and discovery are contemporaneous. Since its enactment in 1972, through December 11, 1980 when CERCLA was adopted, we have found no record of the Clean Water Act ("CWA") having ever been applied to a discharge occurring before 1972,

nor any case discussing the possibility of applying CWA "retroactively" to pre-1972 conduct. The whole approach of the CWA is to hold liable owners and operators at the time of discovery of a spill. CWA § 311(f), 33 U.S.C. § 1321(f). Because CERCLA specifically incorporates the standard of liability under CWA, CERCLA on its face is prospective only. Indeed, as will be shown below, the last minute engrafting of the CWA standard of liability was a key element in the final legislative compromise that allowed CERCLA to pass.

CERCLA also contains an effectivity clause: "Unless otherwise provided, all provisions of this chapter shall be effective on December 11, 1980." CERCLA § 301(a), 42 U.S.C. § 9651(a). An almost identical provision is contained in the 1991 Act referred to in *Landgraf*. As to that provision the Court stated: "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." 511 U.S. at 257. The Court later noted that such a provision simply denotes an absence of an intention by Congress with respect to retroactivity - it denotes a willingness to allow the matter to be decided under normal judicial standards, including the presumption against retroactivity. *Id.* at 280.

The structure of the liability provisions of CERCLA is also consistent with prospective liability for persons that lawfully "arranged for disposal" prior to CERCLA's adoption. CERCLA provides for the cleaning up of abandoned waste sites in two ways. First, it created a $1.6 billion dollar fund (subsequently increased to $8.5 billion.) The fund was to be in part created and replenished from a "feed stock" tax on petrochemical shipments. Second, CERCLA created a liability mechanism under Section 107 to deter the mishandling of hazardous wastes and further help replenish the fund. The liability structure also authorized EPA to directly impose the costs of cleanup on parties that are potentially liable under CERCLA § 107 by issuing orders under CERCLA § 106 to do the cleanup.

Those cleanup orders are backed by sanctions of up to $25,000 per day and treble damages for noncompliance.

Thus, there is no question but that the generalized purpose of CERCLA was to address the problem of abandoned waste sites (such as the Love Canal site) and to help to replenish the fund created by a combination of the feedstock tax and the liability structure. However, it is not the purpose of the act as a whole that must be considered. To the contrary, courts should evaluate each provision of the Act to determine whether a clear Congressional decision had been made to impose retroactive liability under the provision in question. *See* 511 U.S. at 280-86.

The Provisions of Section 107

CERCLA § 107(a) creates liability for four classes of persons. Section 107(a)(1) creates liability for the current owners of facilities. Section 107(a)(2) creates liability for those who owned or operated the facility "at the time of disposal". Section 107(a)(3) creates liability for those who "arranged for disposal". Section 107(a)(4) creates liability for any person who "accepts or accepted" the materials for transport.

The government frequently argues that the use of the past tense ("owned or operated", "arranged for disposal", or "transported") manifests a clear Congressional intent to have the liability created apply retroactively. It should be obvious that the use of the past tense is not dispositive. For example, "operated" can mean "operated" before or after the date of adoption. Indeed, the very statutory language at issue in *Landgraf* that this Court found to be prospective only used the past tense (anyone who "engaged in" unlawful discrimination). A closer look at the specific language of each subsection is required.

Section 107(a)(1), which establishes that the current owner is potentially liable, simply does not present a retroactivity question at all under *Landgraf*. Application of liability to a current owner (i.e., owner at the time the action is commenced) of necessity is to a person that either continued ownership or acquired ownership after CERCLA was adopted. Thus, Section 107(a)(1)

liability does not get past the first prong of *Landgraf* - it creates no retroactivity issue.

Section 107(a)(2) creates liability for anyone who owned or operated the facility "at the time of disposal". Given the concerns about Love Canal and other abandoned sites, the use of the temporal phrase, "at the time of disposal", is suggestive that liability is not necessarily limited to property "owned or operated" after enactment. This reading of Section 107(a)(2) finds some support in Section 103(c) of CERCLA, but that provision also supports our position as to Section 107(a)(3).

CERCLA Section 103(c) provides that within 180 days of the passage of CERCLA, "any person who owns or operates or who at the time of disposal owned or operated a facility" at which hazardous wastes are or have been stored must make notification to the government. This was apparently an attempt by Congress to obtain information from property owners that had contaminated their own property. Failure to provide the information forfeits any defenses to liability under the Statute. The government urged below that if there was no potential for retroactive liability in the first place, there would be no need for a forfeiture of defenses. This misses the point that the liability of current owners (under CERCLA § 107(a)(1)) does not raise a retroactivity issue. We have already noted that on balance the temporal reference in Section 107(a)(2) for owners "at the time of disposal" tends to support the government as to that clause. However, it is significant to note that no information is sought at all under Section 103(c) from anyone who had "arranged for disposal". Following the government's logic leads to the inference that no forfeiture of defenses was provided as to persons who lawfully arranged for disposal before CERCLA's adoption because they had no potential retroactive liability in the first place. Given the legal craftsmanship that went into CERCLA, the clause may simply indicate an intent to gather information from culpable parties[9] which could

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[9] Besides current owners and owner or operators at time of disposal, similar information was to be provided by transporters but only if the

be used to locate sites and to punish those who didn't provide the information. To the extent the clause is relevant, however, it supports our position that there was no intention to impose retroactive liability on anyone that lawfully arranged for disposal before CERCLA was adopted, since that class of persons is not covered at all.

Finally, with respect to Section 107(a)(3) itself, the government's past tense argument breaks down completely. As noted above, "arranged for" can of course mean "arranged for" before or "arranged for" after the date of adoption. Section 107(a)(3) contains no temporal statement. Moreover, as several courts have noted, the tense argument if applied to Sections 107(a)(3) and 107(a)(4) would produce retroactive but not prospective liability for those that arranged for disposal. This a senseless result.[10]

The government's other standard statutory argument is that since CERCLA § 107(f) limits the collection of natural resource damages to those occurring after the date of CERCLA's adop-

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transporter also selected the facility at which hazardous substances were stored or disposed of.

[10] If past tense was intended to mean conduct prior to enactment, then logically the use of the present tense would mean conduct after enactment. CERCLA § 107(a)(4) would cover both conduct before enactment ("any person who ... *acceptea* any hazardous substances...") and conduct after enactment ("any person who *accepts* any hazardous substances..."). By contrast Section 107(a)(3), the section at issue here, is written only in the past tense ("any person who ... *arranged* for disposal..."). As explained in *State of Ohio ex rel. Brown v. Georgeoff*, 562 F.Supp 1300, 1310 (N.D. Ohio 1983):

> Under [the plaintiff's] view, therefore, this provision would apply to generators who arranged for disposal before the enactment of CERCLA, and not those who arrange for disposal after the enactment of CERCLA. Such a construction produces the anomalous result of providing for retroactive, but not a prospective, application of the statute, a result which Congress could not have intended.

See also, State of Nevada ex rel. Dep't of Transp. United States, 925 F.Supp. 691, 699 (D.Nev. 1996)(rejecting government's "past tense" argument).

tion, there is a "negative inference" to be drawn that Congress intended that liability for response costs should be retroactive. *Landgraf* explicitly rejected a similar type of negative inference argument. "Given the high stakes of the retroactivity question, ... it would be surprising for Congress to have chosen to resolve that question through negative inferences..." 511 U.S. at 259. Moreover, in the CERCLA context, Section 107(f) simply limits what a person who is liable under Section 107(a) is liable for. It does not expand the definition of who may be found liable in the first instance.

For example under Section 107(a)(1) the government can recover from the current owner of a site the response costs incurred in cleaning up the site, assuming the other statutory requisites are met (e.g., a discharge of a hazardous substance to the environment and the incurrence of response costs by the government not inconsistent with the National Contingency Plan.) There is no limitation on recovery from the current owner of response costs whether the damage occurred prior to the adoption of CERCLA or after it. Recovery of natural resources damages from the current owner under CERCLA § 107(a)(1), however, is limited by Section 107(f). This scenario is not inconsistent with holding that the liability created under CERCLA § 107(a)(3) is prospective only. To put it another way, finding that CERCLA § 107(a)(3) liability is prospective does not render the damages limitation in §107(f) superfluous since the limitation would still apply to CERCLA § 107(a)(1) and perhaps to CERCLA § 107(a)(2) liability. There simply is no negative inference to be drawn and no inconsistency.

The Legislative History of CERCLA Indicates Either a Congressional Decision That Generator Liability be Prospective Only or No Congressional Decision

The bill that eventually became CERCLA had its genesis in three separate "Superfund" bills. In the House, two bills were passed and sent to the Senate on September 30, 1980: H.R. 85 dealt with the cleanup of oil spills from vessels; H.R. 7020 dealt

with the cleanup of abandoned waste sites. Earlier, in July of 1979, a broader, more comprehensive waste cleanup bill, S. 1480, had been introduced in the Senate. While different in many respects, the House abandoned waste site bill, H.R. 7020, and S. 1480 both contained similar liability provisions including common law type causation requirements as well as provisions for strict joint and several liability.[11] As introduced, the House bill contained a provision explicitly making the liability retroactive. This was deleted in committee. The bill coming out of committee still contained the common law causation in fact requirement. Although causation in fact might be viewed as still indicating potential retroactive liability, the burden on the plaintiff to prove common law type causation was a significant limitation on the potential liability. As stated in the House Report on H.R. 7020:

> [T]he mere act of generation or transportation of hazardous waste, or the mere existence of a generator's or transporter's waste in a site with respect to which cleanup costs are incurred would not, in and of itself, result in liability....the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action...

H.R. Rep. No. 96-1016, Part I, 96th Cong., 2d Sess. (1980) reprinted in 2 Legislative History at 64. Under the example given, generators and transporters obtained some insulation from liability by requiring that a plaintiff prove a common law type causal or contributory nexus.

Both H.R. 7020 and S. 1480 also provided for the creation of a "fund" to be financed through fees imposed gener-

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[11] *See* H.R. 7020, 96th Cong., 2d Sess. § 3071 (1980) (as introduced), reprinted in 2 A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) 38-41 (1983) (hereinafter 2 Legislative History); and S. 1480, 96th Cong., 1st Sess. § 4 (1979) (as introduced), reprinted in 1 Legislative History at 168-73.

ally on manufacturers of hazardous substances. The primary purpose of the fund was to finance government responses. 1 Legislative History at 59-130, 149. The primary purpose of the liability scheme, on the other hand, was deterrence. Id. at 68-69, 149. Imposing liability on those responsible for releases of hazardous substances would "serve[] as an incentive for the sound treatment and handling of hazardous substances in order to prevent accidents in the first place." *Id.* at 149 (statement of Senator Culver). As noted below, this Court has recognized that a reference to deterrence as the legislative purpose is inconsistent with retroactivity since, by definition, the conduct has already occurred.

Despite the limited scope of liability due to the plaintiff's burden to prove common law type causation, both of these bills were objected to on a number of grounds, including that the liability might be retroactively applied. In the Senate, several key Senators (including minority leader Howard Baker) opposed the potential liability for cleanup costs that would be created "in some cases" retroactively under S. 1480. *See* 1 Legislative History at 426 (statement of Sens. Baker, Bentsen and Domenici). There was also similar opposition in the House. *See* 2 Legislative History at 359. After the provision in the House bill that provided for retroactivity was stricken, the House passed H.R. 7020. 2 Legislative History 294-390. The House bill was referred to the Senate, where it made no further progress.

The Senate focused on its own bill, S. 1480. As reported out of committee, S. 1480 can best be described as a legislative "Christmas Tree". It contained provisions for recovery for such items as damages for economic loss due to personal injury, damage to real property, damage to natural resources, loss of use of natural resources, loss of income or profits, and medical expense reimbursement. These items were in addition to cleanup costs. Provisions were also included by which citizens could assign their claims to the United States, collect from the fund and then the government would have to pursue

the claims. The Senate bill contained the four classes of liability groupings that are currently in the statute (current owners, owners or operators at time of disposal, arrangers for disposal, and transporters). It also provided for strict joint and several liability. 1 Legislative History at 485-501. The Senate bill likewise made no progress.

On November 14, 1980, Senators Stafford and Randolph introduced a compromise bill. Compared with the original Senate bill, this first compromise bill omitted the claims for personal injury damages and for property damage, eliminated the common law causation requirement, deleted all reference to "joint and several liability", and also eliminated "the scope of liability." 1 Legislative History at 695. It retained the four categories of potentially liable persons for cleanup costs carried over from Senate bill as reported out in July *See* 3 Legislative History at 238. The compromise bill that Senators Randolph and Stafford crafted came up for consideration on November 20, 1980. However, it did not fare any better on the Senate floor than did the original bill. One of the main (and most influential) opponents, minority leader Baker, stated:

> I do not think, in all candor, that the Randolph-Stafford bill is a compromise in the sense that it would permit us to proceed at this time to the consideration of this measure. [¶] ... I express my regret that we apparently are at an impasse on this subject ...

1 Legislative History at 554.

With time running out on the 96th Congress, a bipartisan coalition of Senators emerged on November 24, 1980 from several days of closed-door sessions with a second, revised compromise bill known as the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980." 1 Legislative History at 560. It too retained the four categories of potentially liable persons for cleanup costs carried over from Senate bill as reported out in July, but, among other things, it added for the first time an overarching provision that

all liability would be governed by the standards of the Clean Water Act. 1 Legislative History at 577-78, 602-03.

Senator Stafford noted: "It became clear, soon after we introduced our original compromise amendment last week that there remained strong concern and opposition to even that measure." *Id.* at 695.

> I am a realist. I know that Members of the Senate find S. 1480 too ambitious. I believe they are mistaken. I believe 23 other Senators agree with me because they have cosponsored S. 1480. *But the fact remains that at this time and in this place S. 1480 cannot be enacted. But this final compromise can.*

Id. at 696 (emphasis added). The inclusion in the final compromise of the overarching provision setting the standard of liability as the standard in the Clean Water Act, which was not in the Senate bill as reported out in July or in the first Stafford - Randolph compromise bill, allowed each Senator to put a somewhat different "spin" on what had been agreed to.

Senator Randolph linked the Clean Water Act reference to the retention of strict liability:

> "Unless otherwise provided in this act, the standard of liability is intended to be the same as that provided in section 311 of the Federal Walter Pollution Control Act (33 U.S. 1321). *I understand this to be a standard of strict liability.*"

1 Legislative History at 686 (emphasis added).

Senator Helms linked the Clean Water Act reference to resolving the harshness of potential joint and several liability:

> The drafters of the Stafford-Randolph substitute have recognized this unfairness, and the lack of wisdom in eliminating any meaningful link between culpable conduct and financial responsibility. Consequently, all references to joint and several liability in the bill have been deleted. The bill now provides that the listed classes of defendants will be liable for government removal and remedial costs and associated damages of natural re-

> sources, in accordance with the standard of liability specified in section 311 of the Federal Water Pollution Control Act [Sec. 101 (32)]. *That section on its face does not impose joint and several liability, and the courts applying section 311 have not attempted to ignore the language of the statute.*

1 Legislative History at 759 (emphasis added). Senator Stafford, made clear that the Clean Water Act standard of liability was to govern in all cases and all new theories of liability had been deleted.

> Mr. SIMPSON. Mr. President, with the adoption of the compromise offered by Senator Stafford and Senator Randolph there are several vital areas which require further elaboration for the record. One issue in particular necessitates additional clarity - liability under section 107. The report of the Senate Committee on Environment and Public Works, Report no. 96-848, went into some detail on the nature of liability under S. 1480 did it not?
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> Mr. STAFFORD. Mr. President, Senator Simpson is correct. As reported by the committee, S.1480 and its accompanying report set the standard of liability as one of joint, several, and strict liability. However, *in order to avoid confusion over new language the compromise bill simply defers to existing law in section 311 of the Clean Water Act which already provides a liability standard for recovery of costs for response and remedial actions in preventing and cleaning up releases or discharges of hazardous substances* [Sec. 101(32)].
>
> Mr. SIMPSON. Mr. President, I find that to be a major improvement since there are various common law and statutory doctrines of 'strict,' 'no fault,' or product liability.
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> Mr. STAFFORD. *The standard of liability in this compromise is the same as the liability under section 311(f)(1) of the Federal Clean Water Act. By referring*

> *to this section we avoid any confusion that might result from new language. The liability standard under section 311 will apply, unchanged, to this bill.*

1 Legislative History at 769 (emphasis added).

The final Senate compromise was passed on November 24, 1980. It was sent to the House with a cautionary letter dated December 2, 1980, from Senators Stafford and Randolph, that the coalition that enabled the bill to pass had begun "to disintegrate to the point that, in our judgment, it would now be impossible to pass the bill again, even unchanged." 1 Legislative History 774-75. The bill, they acknowledged: "represents an extremely delicate balancing of interests". They concluded: "[I]t is not what we would have wanted under other circumstances, but was the best we could do at the time." *Id.* The House accepted and passed the Senate bill without change as HR 2720, and the Senate inserted its comprehensive amendment into HR 7020 on December 3, 1980. 1 Legislative History at 776-824.

As noted above, the standard of liability under the Clean Water Act is prospective. Since the Clean Water Act had been in effect for eight years, Congress is presumed to have known that. On an individual basis, it is impossible to know what each Senator had in mind when he or she voted for a bill that "represents an extremely delicate balancing of interests". But they all certainly knew that the liability issues had been swept under the proverbial rug. Interestingly, not a single supporter of the final Senate compromise bill indicated that retroactive liability was intended by the compromise or which provisions in the final CERCLA compromise bill, if any, were intended to create retroactive liability.

The government relied below on the "Additional Views" of those Senators who five months before were concerned about the scope of liability in the earlier (Christmas Tree) version of the Senate bill. That was the bill that Senator Stafford later admitted "cannot be enacted". Acknowledging that

a mechanism was needed to clean up the old hazardous waste sites, Senators Domenici, Bentsen and Baker added "[h]owever, we do take issue with the approach that S. 1480 [as reported out in July] takes in substantially changing existing common law (in *some* cases retroactively)...." 1 Leg. Hist. 426. (emphasis added). "Some" cases, however, is not "all" cases.[12]

The fact that Congress intended CERCLA liability to serve as a deterrent to those who manufactured and transported substances also tends to negate any intention to create retroactive liability as to those classes of persons. There is no deterrent effect in the retroactive imposition of liability since the conduct to which it applies has been long ago completed. This Court has repeatedly indicated it would "hesitate to approve the retrospective imposition of liability on any theory of deterrence ..." *Landgraf* 511 U.S. at 281 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)). The *Usery* decision, preceded CERCLA by four years and was also presumably known to at least some members of Congress.

Congress Did Not Embrace Any Judicial Opinion Interpreting CERCLA to be Retroactive

The government is likely to cite to pre-*Landgraf* cases holding CERCLA retroactive, and then argue that Congress has

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[12] If anything, this tends to confirm that potential retroactivity in "some" cases was one of the issues that came out of the Senate Report that was resolved in the final compromise by incorporation of the Clean Water Act liability standard. Moreover if Congress had intended section 107(a) to be retroactive in all four categories, the compromise would have created broader liability than the original bills because the need for a plaintiff to prove common law type causation had been deleted. Broader liability was clearly not intended. Moreover, the final Senate superfund bill that went on to be enacted as CERCLA was *cosponsored* by minority leader Baker and was supported by Domenici and Bentsen. CERCLA was passed, therefore, with the *support*, not the opposition, of those senators who had most strongly opposed even the limited potential retroactive liability in the original Senate bill. If there is any inference to be drawn, it is that their concerns had been addressed.

reauthorized CERCLA twice (in 1986 and again in 1990). It is well settled that when Congress reenacts a statute in the face of clearly developed case law, the reenactment includes the settled judicial interpretation of the statute. In 1990, however, Congress did not reexamine or revise any of CERCLA. All that Congress did that year was to reauthorize the taxing authority to finance the superfund.

When CERCLA was reauthorized in 1986, it had been less than six years since it had been originally enacted. No circuit court had ruled on the issue of retroactivity,[13] and among the district courts there was no uniformity of interpretation. *Compare Georgeoff*, 562 F.Supp. at 1314 and *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1073 (D.Colo. 1985). (holding CERCLA to be retroactive) *with United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.Supp. 984, 996 (D.S.C. 1986) (holding application of CERCLA to past conduct not to constitute retroactivity in the constitutional sense).

By contrast, this Court's cases on the use of that proposition show a very different fact pattern. In both *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983), and *Lorillard v. Pons*, 434 U.S. 575, 581 (1978), there were over 30 and 20 years, respectively, of developed case law (including numerous appellate decisions) interpreting the respective statutes. In *Pierce v. Underwood*, 487 U.S. 552, 567 (1988), all of the Circuits had interpreted the statute at issue, and all but one Circuit had interpreted it the same way.

Cases Since Landgraf

Since *Landgraf*, there has been one appellate court decision and several district court decisions, all supporting the government's interpretation albeit on somewhat different theories.

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[13] The first appellate court decision supporting the government's position was *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986)(*NEPACCO*). *NEPACCO* was decided several months after CERCLA was amended in 1986.

Many of the cases are distinguishable or demonstrably incorrect. The *Olin* decision in the Eleventh Circuit, *supra,* dealt with a current owner that was also the owner or operator at the time of disposal, under CERCLA §107(a)(1)(2). It did not deal with generator liability under CERCLA §107(a)(3). The Eleventh Circuit acknowledged that CERCLA contains "no explicit statement regarding retroactive application of its cleanup liability provisions." 1997 U.S. App. LEXIS 5488, *20. *Landgraf* states that if "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect". 511 U.S. at 279. Thus, the Eleventh Circuit's first responsibility was to determine whether it faced a retroactivity issue at all. Since in *Olin* the defendant was the current owner when the action was brought and had been for many years after CERCLA was adopted (the claim having been brought in part under CERCLA § 107(a)(1)), no retroactive application of CERCLA liability was involved. That should have been the end of the analysis. The Court, however, also went on to note the temporal provisions in CERCLA §107(a)(2)(i.e., owner or operator "at the time of disposal").

> Congress thus targeted both current and former owners and operators of contaminated sites. By imposing liability upon former owners and operators, Congress manifested a clear intent to reach conduct preceding CERCLA's enactment.

1997 U.S. App. LEXIS 5488, *20. As applied to site owners and operators, the Eleventh Circuit may be right. Nothing, however, suggests that persons that lawfully arranged for disposal prior to CERCLA's adoption are covered retroactively. The Eleventh Circuit then relies upon the government's Section 103 (c) argument to further support its interpretation of legislative intent. 1997 U.S. App. LEXIS 5488 *21. As noted above, however, CERCLA §103(c) does not apply at all to persons that arranged for disposal. The Eleventh Circuit then asserts that only by creating retroactive liability can CERCLA's purposes of cleaning up pollution and "assigning responsibility to culpable

parties" be achieved. 1997 U.S. App. LEXIS 5488 *23-24. The whole point, however, is that persons who lawfully arranged for disposal are not culpable parties and the legislative history does not show a clear intent to assign liability to them retroactively. In the instant case (Butler Tunnel) the culpable party was the recycler who unlawfully disposed of waste in a borehole instead of recycling it as he was licensed and paid to do. The recycler went to jail. There is no evidence anywhere in the record that Alcan (or any of the other Respondents that dealt with the recycler) had any knowledge of the recycler's activities. That is why the imposition of retroactive liability on those who lawfully "arranged for disposal" is so unfair, and should not be lightly inferred.

The *Olin* court seeks additional support for its conclusion from the fact that the four categories of liability in the final Senate compromise bill that passed were carried forward essentially unchanged from what we have characterized as the Christmas Tree bill reported out of committee in July of 1980. 1997 U.S. App. LEXIS 5488, *25. While it's true that the four categories of liability were carried forward, the relevant fact that the Eleventh Circuit missed is that the bill could not pass, and didn't, until the Clean Water Act standard of liability was engrafted onto it as part of the final compromise. The four categories didn't change, but the standard of liability did. Finally, the Eleventh Circuit incorrectly states that the passage of the bill didn't turn on retroactivity but on redaction of the prior bill's provisions for joint and several liability and for liability for personal injury. 1997 U.S. App. LEXIS 5488, *26. If that were true, the first Randolph - Stafford compromise bill would have passed, since those items were all redacted. *See* 3 Legislative History 238-239.

The Eleventh Circuit's errors in attempting to devine legislative intent emphasizes the need to adhere to the wisdom that underlies *Landgraf*. If the decision to impose retroactive liability is not either (a) expressly provided for in the law itself as passed by Congress and signed by the President, or (b)

otherwise clear (e.g., from an unambiguous statement in a Senate - House Conference Report that the Senators and Congressmen clearly knew about when they voted for the bill), the liability created is prospective - period. Imposition of retroactive liability is a legislative, not a judicial task.

Some examples of the district court decisions since *Landgraf* point up the problem of courts searching for legislative intent from snippets of history or finding clear intent to create retroactive liability from a generalized purpose to remedy the problem of abandoned waste sites. In *Cooper Industries, Inc. v. Agway, Inc.*, 1996 U.S. Dist. LEXIS 14196 (N.D.N.Y., Sept. 23, 1996), the court reviewed in detail the House Report. 1996 U.S. Dist. LEXIS 14196 * 25-26. "Based on the foregoing, the Court finds that Congress intended CERCLA to be applied retroactively." *Id.* at *26. The court was apparently unaware that it was the Senate bill, not the House bill, that passed. In *State of Nevada ex rel. Dep't of Transp. v. United States, supra,* the court found the legislative intent to provide for retroactive application of the CERCLA's liability provisions from the general legislative purpose to address abandoned sites and cleanup the environment from past disposal practices. 925 F.Supp. at 695, n. 8. This is basically the same pattern as from the pre-*Landgraf* cases.

The leading pre-*Landgraf* cases were *Georgeoff, NEPACCO* and *Shell Oil.* The Courts in all three cases gave lip service to the then admittedly ambiguous presumption against retroactivity. Each case begins its analysis by finding no clear statement or intent in CERCLA's liability provision that Congress intended CERCLA liability to apply retroactively. Having done so, the courts then proceeded to draw every possible inference in favor of the retroactive application of CERCLA, essentially reversing the presumption against retroactivity into one *in favor* of retroactivity.

In *Georgeoff*, the court (after rejecting the "past tense" argument) nevertheless found a clear Congressional intent in favor of retroactivity from the fact that the $1.6 billion "Superfund"

funded by tax revenues standing alone would be insufficient to clean up all the estimated sites. *Georgeoff, supra*, at 562 F.Supp. at 1312-1313. That apparent insufficiency may have be true but the correct answer was for Congress to fix the problem, not for the Court to do Congress' job for it. (Interestingly, the $1.6 billion the Court found too little was later increased by Congress to $8.5 billion, as noted above). In *NEPACCO*, the court found it "manifestly clear that Congress intended CERCLA to have retroactive effect" based largely on the "past tense" argument discussed above. 810 F.2d at 732-33. "Further," the court continued, "the statutory scheme itself is overwhelmingly remedial and retroactive." 810 F.2d at 733. Finally, in *Shell Oil*, the court had concluded that CERCLA was retroactive based on the "general purpose and scheme of CERCLA" before it even got to an analysis of CERCLA's specific statutory provisions. 605 F.Supp. at 1069, 1073. In light of this Court's holding in *Landgraf*, these pre-*Landgraf* decisions cannot be relied upon as precedent.

CONCLUSION

Remanding the instant case to the Third Circuit with instructions to reconsider in light of this Court's decision in *Landgraf*, which intervened between *Alcan I* and *Alcan II*, would send a strong and needed signal to the lower courts to take seriously this Court's admonition in *Landgraf* that legislation creating new liability is always deemed to be prospective unless the people's elected representatives (not judges) make a clear decision to impose the liability retroactively.

Respectfully submitted,

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Incorrect Statements in Alcan's Petition for Certiorari

Alcan states that the EPA response in 1985 to the oily slick on the Susquehanna River was driven by hazardous substances which were identified as "Consent Order Constituents" (Petition, p. 4. n. 1). It also states that the Government recovered a disproportionately small percentage of EPA's response costs from other defendants. Consent Order Constituents". (Petition, p. 4).

With respect to the first statement, the Consent Order was entered in 1987 and designated constituents to be studied thereafter. With respect to the 1985 cleanup itself, Alcan's witnesses acknowledged that there were hazardous constituents in the oily slick but testified the response costs were the really the result of oil (J.A. 95, 100, 102). The government's witness also acknowledged the hazardous constituents in the oily slick (J.A. 129, 133) but testified that there were no cleanup activities in 1985 for material that was not oil or dissolved in oil. J.A. 129-132. When asked what actually drove the response costs, EPA's witness testified: "Oil. The 1985 response was initiated because there was oil on the river." J.A. 157. With respect to the second statement, Alcan was one of the recycler's best customers J.A. 211. The government's best estimate is that 121,000 to 300,000 gallons of Alcan's waste oil was disposed at the Borehole. J.A. 197. This is more than the 32,500 to 37,500 gallons taken into account below and the bulk of Alcan's 2.3 million gallons sent to the recycler (J.A. 252) are not accounted for in the record. The used Farbest B207 and B216 in Alcan's waste (J.A. 231-32) caused its waste to be "self-emulsifying". J.A. 89-90. It preferentially dissolved constituents in the Tunnel (J.A. 113-14), had a scouring effect that tended to mobilize tunnel waste, increased the discharge, and moved the contamination further down the river J.A. 119-20, 140-42. It also made EPA's booms less effective in preventing the spread of the oily slick down the river. J.A. 119, 140-42.

Supreme Court, U.S.
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NO. 96-1494

IN THE

Supreme Court of the United States

October Term, 1997

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE OF* THE FOOD INDUSTRY ENVIRONMENTAL COUNCIL, THE NATIONAL RESTAURANT ASSOCIATION, THE AMERICAN COKE AND COAL CHEMICALS INSTITUTE, THE NATIONAL OILSEED PROCESSORS ASSOCIATION, AND THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Whether The United States Court Of Appeals For The Third Circuit Erred In Holding That Causation Is Not An Element Of CERCLA Section 107(a) Liability.

II. Whether the United States Court of Appeals For The Third Circuit Erred In Holding That Concentration Thresholds Are Not Implicit In The Definition of Hazardous Substances In CERCLA Section 101(14), Thereby Expanding The Definition To Encompass Everything In The Universe.

III. Whether The United States Court Of Appeals For The Third Circuit Erred In Shifting The Burden To Alcan To Prove The Absence Of Causation In Order To Limit Or Avoid CERCLA Section 107(a) Liability And Ease Government Enforcement Efforts.

IV. Whether The United States Court Of Appeals For The Third Circuit Erred In Requiring Alcan To Prove Its Emulsion As A Whole Was Environmentally Harmless In Order To Limit Or Avoid CERCLA Section 107(a) Liability, Even Though The Emulsion Contained None Of The Hazardous Substances Which Triggered EPA's CERCLA Response.

V. Whether The United States Court Of Appeals For The Third Circuit Erred In Ignoring Alcan's Motion To Dismiss For Lack Of Subject Matter Jurisdiction And Thus Failing To Apply To CERCLA The Strong Presumption Against Retroactivity In The Manner Articulated By This Court In *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994).

LIST OF PARTIES

United States of America, Plaintiff.

Alcan Aluminum Corp.; BASF Corp.; Beazer Materials and Services, Inc.; Borg-Warner Corp.; Carrier Corp.; Chemical Leaman Tank Lines, Inc.; Chemical Management, Inc.; Chrysler Motors Corp., Dana Corp., Dart Industries, Inc.; Exxon Corp.; Ford Motor Company; Goulds Pumps, Inc.; Hitchcock Gas Engine Company, Ingersoll-Rand; NEAPCO, Inc.; Rome Strip Steel Co., Inc.; Stanley Works, Inc.; TRW, Inc.; United Technologies, Defendants.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Food Industry Environmental Council (FIEC) is a coalition of trade associations and companies in the food processing industry. The member organizations of FIEC include, but are not limited to, the following associations:

- American Frozen Food Institute (AFFI) is the national trade association representing frozen food manufacturers, their suppliers, and marketers. Its members are responsible for approximately 90% of the frozen food produced annually in the United States valued at more than $60 billion dollars;

- American Meat Institute (AMI) established in 1906 is the nation's oldest and largest meat industry trade association with some 900 members. AMI represents the interests of packers and processors of beef, pork, lamb, veal and turkey products and their suppliers throughout North America;

- Grocery Manufacturers of America (GMA) member companies have sales of $400 billion dollars, representing the largest volume of all food and consumer packaged goods sold in the United States;

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[1]Both the Petitioner, Alcan Aluminum Corporation, and the Respondent, United States, have consented in writing to the filing of this *amicus curiae* brief in support of Petitioner. In addition, respondents Beazer Materials and Services, Inc., Exxon Corporation, and Ford Motor Company have also consented to the filing of this *amicus* brief. The letters of consent have been filed with this Brief.

- Institute of Shortening and Edible Oils (ISEO) is a trade association which represents the refiners of approximately 90-95%, or 17 billion pounds, of the edible fats and oils produced domestically;

- International Dairy Foods Association (IDFA) is an international trade association comprised of three organizations: Milk Industry Foundation, the National Cheese Institute and the International Ice Cream Association, and is affiliated with the American Butter Institute. Together these organizations represent 85% of the dairy products consumed in the United States;

- International Institute of Ammonia Refrigeration (IIAR) is a non-profit trade association which has 1100 member companies that range from small, family owned businesses to large corporate entities;

- Midwest Food Processors Association (MWFPA) represents processors of canned and frozen food products located in Illinois, Minnesota and Wisconsin;

- National Confectioners Association (NCA) and the Chocolate Manufacturers Association (CMA) represent 100 manufacturers and almost 300 other associated firms that produce the vast majority of chocolate and non-chocolate candy manufactured in the United States; and

- National Food Processors Association (NFPA) members include over 500 companies who manufacture $400 billion dollars of processed food products.

The National Restaurant Association (Restaurant Association) is the leading national association for the $290 billion food service industry in the United States. The Restaurant Association represents, *inter alia*, restaurant members, including fast food chains as well as traditional formal sit-down dining restaurants. The Restaurant Association's members number almost 30,000.

The American Coke and Coal Chemicals Institute (ACCCI) is a non-profit trade association that represents merchant producers of metallurgical coke (both furnace and foundry coke); coke sales agents; integrated steel producers; producers and processors of chemicals derived from the distillation of coal and coal tar; and suppliers to these various producers and processors.

The National Oilseed Processors Association (NOPA) is a trade association comprised of 13 regular and 25 associate member companies with plants engaged in the processing of vegetable meals and oils from oilseeds. NOPA's 13 regular member companies process an estimated 1.1 billion bushels of oilseeds annually at 67 plants in 22 states, employing an estimated 4,250 workers.

The interest of ACCCI and NOPA in this case stems from the fact that while the majority of their members' waste streams are non-hazardous in nature, the waste streams may contain trace compounds of elements that are defined as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* (such as below background metals), which are naturally occurring and pose no threat to human health or the environment. ACCCI and NOPA are concerned that the Third Circuit's failure to focus on whether the hazardous substances in the Alcan Emulsion caused response costs at the Butler Tunnel Mine Site could result in its

members bearing the bulk of remediation costs caused by the wastes of other parties.

The National School Boards Association (NSBA) is a not-for-profit organization representing forty-nine state school board associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. The NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97% of all United States public school children.

Public schools in the United States are presently charged with one of this nation's most important responsibilities--the educational and personal development of our children. The goals of the NSBA are to educate our children in order that they can successfully compete in a global economy and participate in the growth of our nation in a manner that will almost certainly be far more demanding than in the past. Having been charged with this task, NSBA's members have not been immune from the financial restraints that have impacted NSBA's entire economy. In many respects, our members' difficulties have been exacerbated by the need to develop an expanded curriculum consistent with the need for global understanding, the need to participate in retraining programs as life-time careers become less likely, and the need to face the reality that the property tax base which is the primary income source for most of its members is becoming a strained resource.

The Third Circuit's ruling in this case is of serious concern to the NSBA and its members for a number of reasons. First, the Third Circuit's ruling poses the threat of substantial financial hardships on our public schools that has no reasonable relationship to any

harm they caused. Second, the standard adopted by the Third Circuit is inconsistent with responsible environmental policy. Finally, the Third Circuit's decision is in fundamental conflict with the underlying intention of the polluters pay scheme. By exposing schools to environmental liability for which they are not responsible, the Third Circuit has simply introduced into an already strained property tax base, environmental liability of others.

SUMMARY OF ARGUMENT

Amici strongly urge this Court to grant Alcan Aluminum Corporation's Petition for Writ of *Certiorari* for a number of reasons. First, the fact that there is no quantitative threshold associated with the definition of hazardous substance in CERCLA combined with the fact that there is no causation requirement, mean that virtually everything in the universe is a hazardous substance and liability is automatically imposed regardless of how innocuous the waste. This liability scheme is unreasonable and is not what Congress intended.

Second, the facts in this case present the legal issues of no causation, no limitations to the definition of hazardous substance as well as the issue of retroactivity in the clearest form possible. Therefore, this Court is presented with the opportunity to address and resolve these issues clearly.

Third, *Amici* encourage this Court to grant Alcan's Petition to protect the rights of those who are effectively denied their fundamental right of appeal due to the likelihood and extent of liability.

Lastly, *Amici* ask this Court to grant Alcan's Petition because this case presents the issue not only

of whether CERCLA may be applied retroactively, but whether it is Constitutional to apply the statute retroactively in a situation where Alcan is being held liable for the costs of remediating conditions not associated with its actions.

ARGUMENT

A. This Court Should Grant Alcan's Petition Because The Facts Leading To The Imposition Of Joint And Several Liability In This Case Are Not Unique To Alcan And, Therefore, This Case Has Wide-Spread Application.

The limitless definition of hazardous substance in CERCLA, which includes virtually everything in the universe, has been widely used to trap many of *amici's* members in the expansive CERCLA liability scheme. This is the case even though the likelihood was remote that the constituents of their waste streams were related to the environmental problems that triggered the CERCLA remediation.

CERCLA's present liability scheme is not limited to *amici's* industries or even business in general. In fact, the present state of the law has not permitted anyone to escape liability. For example, in one case in upstate New York, schools, meat markets, fabric stores, kennels, civic clubs, hardware stores, and even individuals were targeted as fourth party defendants in *New York v. Ludlow's Sanitary Landfill, Inc.*, No. 86-CV-853 (N.D.N.Y. filed July 24, 1986). A recent case in the Second Circuit, *B.F. Goodrich Co. v. Betkoski, et al.*, 99 F.3d 505 (2d Cir. 1996), sets forth a legal standard for liability that puts no limitations on CERCLA liability once again. In contrast with both the First Circuit in *Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146 (1st Cir. 1989) and the

Eighth Circuit in *Farmland Industries v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335 (8th Cir,. 1993), the Second Circuit has rejected specific causation as a requirement for the imposition of liability noting: "Significantly, it is 'not required that the [plaintiff] show that a specific defendant's waste caused the incurrence of clean-up costs.'" *Id.* at 514, quoting *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993). Unlike the Third Circuit, the Second Circuit in *Betkoski*, which involved private parties as well as the United States, apparently treats both private parties and the United States the same and requires neither to show causation, leaving it exclusively up to defendants to raise the issue of causation's absence and thereby shoulder the burden of proof in order to escape liability.

For many, the ability to escape liability is not an economically realistic alternative no matter how unlikely it is that their waste was related to the problems requiring remediation. The legal expenses associated with meeting their burden both with respect to lawyers and experts forces defendants to accept the best deal they are offered to avoid the risk of being held jointly and severally liable. As the facts of this case illustrate, that almost certainly means defendants will pay a share that is far in excess of any contribution their waste had to the harm at the site.

In addition, the Second Circuit in *Betkoski* reiterated and expanded the definition of hazardous substances to be totally encompassing. The district court, applying common sense, had rejected the notion that a party could be held automatically jointly and severally liable even though it disposed of a material that was not recognized as hazardous in any other context. Rejecting the notion that there were any quantitative limits to the definition, the Second Circuit, following the Alcan

doctrine, held that liability was immediate if the material contained any hazardous substance even if the material actually disposed itself posed no hazard. 99 F.3d at 517. Under this simplistic logic, used decaffeinated coffee grounds that had trace levels of TCE could be the basis for the immediate imposition of joint and several liability although no one could seriously contend the coffee grounds were hazardous.

The combination of these two legal notions, the absence of causation and a boundless definition of hazardous substance, create potentially devastating legal exposure to virtually everyone. Courts which have adopted this conclusion cite as a legal basis a legislative history that has been recognized as vague and contradictory at best. This reasoning is questionable and requires the thoughtful review of this Court.

B. This Court Should Grant Alcan's Petition Because The Facts Present The Issues In A Clear And Precise Manner.

The procedural context of this case, that is, that the district court's decision against Alcan was rendered in the context of a motion for summary judgment, eliminates any question of a factual dispute since reasonable inferences must be resolved in favor of Alcan. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). In addition, the United States has not disputed any of the critical facts. The facts of this case are simple and straightforward. The only constituents that are the basis for CERCLA liability are trace metal compounds which are below background. The levels of these metals are lower than those present in air, garden soil, and many common foods. If there is any example that stretches the statutory meaning to its extreme, these facts certainly do.

Further, there is no metals problem of any kind at the site and none of the constituents that triggered the CERCLA remediation were contained in the Emulsion which was primarily water with a small percentage, five percent (5%), of mineral oil, a biodegradable oil similar to petroleum jelly, in suspension.

There is no causal connection between the constituents of the Alcan Emulsion and the constituents that triggered the CERCLA response action. Consequently, both the legal issues of causation and the appropriate extent of the definitional section of the statute are presented in the clearest form possible.

These facts also present the issue of whether CERCLA can be construed to apply retroactively consistent with this Court's direction in *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994) in the clearest fashion, since none of Alcan's actions would have resulted in liability prior to CERCLA's enactment. The contamination was at a third party site, not on Alcan's property. Alcan's actions were consistent with all legal standards, and to the extent it was paying to have its waste oil recovered at a state licensed recycler rather than simply discarded certainly establishes its conduct as exemplary for its time. Finally, there is no causal connection between the response costs at which CERCLA was directed and the Alcan Emulsion. In sum, without CERCLA Alcan would not be in its current situation of being liable for problems created by the wastes and malfeasance of others.

C. This Court Should Grant Alcan's Petition To Insure That The Thousands Who Are Being Abused As A Result Of The Liability Scheme Have An Effective Right Of Appeal Which Is Presently Denied Them By The Untenable Risk Of Joint And Several Liability.

One of the preeminent tenets of our legal system is that incorrect construction or interpretation of statutes is the subject of review by appellate courts and ultimately by this Court. This notion of appellate review is an integral part of our legal system. Yet, in the context of the Superfund liability scheme as applied by many courts, this right has no practical value because the enormous litigation costs and the potential for extensive liability have resulted in many forgoing their right to fair treatment and due process. Instead, many parties settle, accepting the best deal possible because of the economics. One Congressman has described Superfund as "a lottery system cloaked with the trappings of lawyers and courts designed to shake people down for money." (*Hearings before the Subcommittee on Commerce, Trade, and Hazardous Materials of the Committee on Commerce, House of Representatives, 104th Congress, First Session on Liability, Superfund Reauthorization (Part 3)*, June 22 and July 18, 1995, Serial No 104-54, Comments of Chair Michael G. Oxley, Ohio Representative, at p.2.) (Appendix A-1.)

The procedural history of this case demonstrates the time, money, and sheer will power required to sustain a Superfund lawsuit to the point that it is ripe for review by this Court. The claim for recoupment was initiated in 1985. This response action was initiated by the United States in 1989. Only after two hearings at the trial level, as well as two appellate reviews, is this case finally before this Court. It has been more than a

decade since the United States initiated its cost recovery actions. For most people, even large companies, absorbing the legal expenses for that period of time can be economically devastating. Add to that fact that the defendant must be willing to run the risk of liability disproportionate to its contribution to a site in an unpredictable legal climate in which the standard that will eventually be applied to a case, even after appellate review, is uncertain. This scenario practically forecloses effective appellate review.

The fact that Alcan has been willing to bear those costs and run the risks is remarkable. The fact that Alcan has done so to provide this Court with a unique opportunity to focus its attention on critical legal issues surrounding CERCLA presents a rare opportunity for this Court to exercise its review of a statute that has a troubled and controversial history. *Amici* strongly urge this Court to take this opportunity to review the compelling issues presented by this case. The likelihood that such an opportunity will present itself again is remote.

D. This Court Should Grant Alcan's Petition Because This Case Presents The Issue Of Whether The Retroactive Application Of CERCLA Under The Facts Of This Case Constitutes A Due Process Violation.

Alcan has raised the issue of whether CERCLA may be applied retroactively based on this Court's decision in *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994), and the decision in *United States v. Olin Corp.*, 927 F.Supp. 1502 (S.D. Ala. 1996).[2] In

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[2]Alcan raised this issue by Motion in the Third Circuit. The Court, however, failed to acknowledge the Motion in affirming the lower court without opinion.

Landgraf, this Court held that the strong presumption against retroactivity may only be rebutted by clear evidence that Congress intended for the statute to apply retroactively. *Landgraf*, 511 U.S. at 262. In *Olin*, which is presently on appeal in the Eleventh Circuit, the district court held that CERCLA may not be applied retroactively under the *Landgraf* standard.

The facts of this case, however, also raise a Constitutional issue with respect to retroactivity, which is whether retroactive application of CERCLA under the facts of this case constitutes a due process violation. As this Court recognized in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976), retroactive legislation must satisfy the test of due process. Therefore, a statute cannot be applied retroactively unless there is a rational relationship between the retroactive application of the statute and the congressional purpose being forwarded. In this case, the Third Circuit held that the government does not have to prove causation in a CERCLA case. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 at 264 (3d Cir. 1992). However, the legitimate congressional purpose behind CERCLA is to require parties who caused environmental harm to pay for the remediation. This is the whole notion of the "polluters pay" scheme which is at the heart of the statute. Therefore, even if there is no causation requirement implicit in the statute, there must be causation in order for CERCLA to apply retroactively and comply with due process.

In this case, it has been established that Alcan's Emulsion did not cause and was not capable of causing the environmental harm responded to under CERCLA. Therefore, to apply CERCLA retroactively in the context of this case would violate the Due Process Clause.

CONCLUSION

For all of the foregoing reasons, The Food Industry Environmental Council, The National Restaurant Association, The American Coke And Coal Chemicals Institute, The National Oilseed Processors Association, And The National School Boards Association request that this Honorable Court grant Petitioner Alcan Aluminum Corporation's Petition for Writ of *Certiorari*.

Respectfully submitted,

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Attorney for *Amicus Curiae* The Food Industry Environmental Council, The National Restaurant Association, The American Coke And Coal Chemicals Institute, The National Oilseed Processors Association, and The National School Boards Association

A-1

SUPERFUND REAUTHORIZATION
(Part 3)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
COMMERCE, TRADE, AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

LIABILITY

JUNE 22 AND JULY 18, 1995

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SUPERFUND REAUTHORIZATION

Liability

THURSDAY, JUNE 22, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND HAZARDOUS MATERIALS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:25 a.m., in room 2123, Rayburn House Office Building, Hon. Michael G. Oxley (chairman) presiding.

Members present: Representatives Oxley, Fields, Upton, Crapo, Bilbray, Frisa, White, Tauzin, Furse, Markey, Boucher, Manton, Brown, Lincoln, Stupak, Rush, Bliley, and Dingell.

Staff present: Nandan Kenkeremath, majority counsel; James Barnette, majority counsel; Hough N. Halpern, professional staff member; Richard A. Frandsen, minority counsel; and David Tittsworth, minority counsel.

MR. OXLEY. The subcommittee will come to order.

The Chair will recognize himself for an opening statement. At the center of any discussion about Superfund is its system of retroactive strict joint and several liability. The administration and others have told us that this system is effectively ensuring that the taxpayer is not saddled with the cost of cleaning up toxic waste sites. They argue that an army of lawyers at the Department of Justice or in the States should make liability retroactive for conduct that was legal or even state-of-the-art management. They argue that

only minor fixes are necessary and that somehow the Superfund liability scheme is necessary for justice and fairness.

Unfortunately, the Superfund's record tells us a far different story. It isn't the polluter who pays when businesses are forced to close their doors because of liability that not only predates the current owners but anyone still alive who ever worked at that company. It isn't the polluter who pays for huge tracts of land that lie underdeveloped because of the fear of environmental liability. And it isn't the polluter who pays higher prices for goods, services, and insurance policies because virtually every business in America is a potential target of a Superfund lawsuit. Rather, it is the American consumer and taxpayer who pays for Superfund through higher prices, lost opportunities, and slowed economic growth.

We can no longer justify the absurd consequences of the Superfund liability system. Every aspect of the Superfund liability system must be reexamined as if we were writing the law for the very first time. Some would argue that only lenders need relief or only small businesses or recyclers. The simple fact of the matter is that single issue fixes do not address the fundamental problem of Superfund: that it is a lottery system cloaked with the trappings of lawyers and courts designed to shake people down for money. Its effects are so bizarre because Superfund's liability system is built on a premise as un-American as any I know, that you are guilty until proven innocent.

Moreover, in the name of making the polluter pay, Congress has imposed a system of wave upon wave of litigation ensuring the highest transaction cost of any environmental program.

At prior hearings we have noted that the amount of man-hours devoted to Superfund by enforcement lawyers at the Department of Justice exceeds all other environmental programs for the years 1990 to 1992 by a wide margin. This year alone the Department of Justice has allocated over $32 million a year from the Superfund budget for that purpose. This funding is in addition to the almost $200 million that EPA admits that it spends on its own enforcement activities. Superfund really is a lawyer's dream come true.

As I have indicated in the past, the idea behind Superfund is not to make the program a scholarship program for lawyers' kids but in fact to clean up the program and to clean up the dump sites, as we have tried to do.

We have also noted that there is an inordinate amount spent on noncleanup spending for fiscal year 1995 at NPL sites versus actual money for cleanup. Federal noncleanup spending includes the cost of PRP and insurer litigation and transaction costs of over $1 billion in Federal Government Administration and overhead costs of some $680 million. This is just for the fiscal year.

A study by the Rand Corporation indicates that 36 percent of the approximately $11.3 billion spent by the private sector at Superfund sites through 1991 went to transaction costs rather than cleanup. Last Congress Mr. Dickerson from ARCO, a witnesses, noted that his company was liable in cases because of the acquisition and subsequent sales of companies over 80 years ago.

What is the fundamental notion of fairness or justice in this scheme? Why should we devote so much of the legal system and the resources of American business to support it? Clearly this liability

system must change. We are committed to changing it this year one way or the other. That is why Chairman Bliley, Chairman Schuster, and I have asked the appropriators to stop funding for Superfund beyond December 31 if we have not passes reform legislation. We will not have a Superfund program that is not fair and reasonable. Substantial reform and creative solutions are what is necessary to fix this program. I hope that our witnesses will join us as we try to develop those solutions, and I look forward to hearing the testimony today.

With that, I recognize the gentleman from Massachusetts, Mr. Markey, for an opening statement.

* * * *

Supreme Court
FILED
MAR 14 1997
CLERK

(4)

NO. 96-1494

IN THE

Supreme Court of the United States

October Term, 1997

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX

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8 pp

LIST OF PARTIES

United States of America, Plaintiff.

Alcan Aluminum Corp.; BASF Corp.; Beazer Materials and Services, Inc.; Borg-Warner Corp.; Carrier Corp.; Chemical Leaman Tank Lines, Inc.; Chemical Management, Inc.; Chrysler Motors Corp., Dana Corp., Dart Industries, Inc.; Exxon Corp.; Ford Motor Company; Goulds Pumps, Inc.; Hitchcock Gas Engine Company, Ingersoll-Rand; NEAPCO, Inc.; Rome Strip Steel Co., Inc.; Stanley Works, Inc.; TRW, Inc.; United Technologies, Defendants.

SUPPLEMENTAL APPENDIX

Attached hereto as a Supplemental Appendix to the Petition for Writ of *Certiorari* of Petitioner Alcan Aluminum Corporation is *United States v. Alcan Aluminum Corp.*, Memorandum Opinion and Order dated October 4, 1995. This Memorandum Opinion and Order was inadvertently omitted from Petitioner's Petition for Writ of Certiorari and erroneously referred to in Opinions Below as printed at A-103.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	CIVIL ACTION
Plaintiff,	:	NO. 89-1657
	:	
vs.	:	(J. VANASKIE)
	:	
ALCAN ALUMINUM CORPORATION,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

In reversing and remanding this Court's determination that Alcan Aluminum Corp. ("Alcan") was jointly and severally liable for the costs of remediating a release of hazardous substances into the Susquehanna River, our Court of Appeals indicated that if Alcan could establish that its used "emulsion did not or could not, *when mixed with other hazardous wastes*, contribute to the release [of hazardous substances into the Susquehanna River] and the resultant response costs, then Alcan should not be responsible for any response costs [incurred by the United States under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C. 9601, *et seq.*]" (Emphasis in original.) *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 (3d Cir. 1992). Alcan had the burden of proving that its emulsion did not contribute to the pollution of the Susquehanna River or that there was a factual basis for the apportionment among

responsible parties of the costs incurred to remediate the Site.[1]

On remand, Alcan did not present any evidence relating to the "intensely factual" matters of relative toxicity, migratory potential or synergistic capacity of its emulsion when mixed with other hazardous substances at issue, nor did Alcan attempt to demonstrate the volume of waste disposed of at the Site or the percentage of that volume represented by Alcan's wastes. Instead, both Alcan and the United States moved for summary judgment, essentially relying on the record that had formed the predicate for the initial summary judgment ruling in this case and the Court of Appeals' decision referenced above. Because Alcan had failed to present an evidentiary basis for its contention that its used emulsion was not part of the chemical soup that was removed from the Susquehanna River and did not otherwise pursue a request for apportionment of damages on some volumetric or other basis, Alcan was held jointly and severally liable for the costs incurred by the United States in cleaning up the polluted Susquehanna River. (Memorandum and Order dated June 28, 1995 (Dkt. Entry 161).)

On July 13, 1995, Alcan filed a motion for reconsideration of the decision granting summary judgment in favor of the United States. (Dkt. Entry 163.) To warrant consideration, the movant must show that there is some clear error of law or evident misapplication of the facts. *Harso Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). Because Alcan has not shown clear

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[1]The Site was a network of coal mines and related tunnels, caverns, pools and waterways bordering the east bank of the Susquehanna River in Pittston, Pennsylvania.

error of law or a misapprehension of the facts, Alcan's motion will be denied.

In its motion for reconsideration and at oral argument Alcan argued that I overlooked "record evidence" which demonstrated that the response action was not directed at Alcan's emulsion. (Dkt. Entry 163 at 2.) It is undisputed, however, that Alcan's emulsion was part of the commingled oily waste that polluted the Susquehanna River. Alcan failed to present evidence showing that its emulsion was not part of the oily scum that was skimmed from the Susquehanna River. Because it is undisputed that the entire "hazardous soup" that discharged into the Susquehanna River was remediated, and Alcan's emulsion was one of the ingredients of this oily stew, it is incorrect to say that the response action was not directed at the emulsion.[2]

Alcan alleges that its emulsion did not float on the surface and, in effect, "passed under" the "Harvard booms" which were used to skim the oily waste from the Susquehanna River. (Dkt. Entry 163 at 7.) This argument considers Alcan's waste emulsion in isolation, and not as a constituent of the mass of oily waste that flowed into the Susquehanna River.[3] Alcan

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[2]Alcan's "dioxin-in-milk" argument misses the point. Alcan's emulsion alone may have necessitated response action, but the milk alone may not. It thus does not follow that the generator of milk contaminated by some other party's dioxin would bear some liability. Because Alcan's discharge of emulsion into a river may warrant some clean-up action and its hazardous constituents bring it within CERCLA's ambit, it is subject to liability even if the response action did not specifically target the hazardous constituents of its waste.

[3]For example, David. J. Lagoe, quoted in Alcan's motion, considered the Alcan emulsion in isolation and did not consider the outcome of it mixing with other substances. Dkt. Entry 133, Exh. 2 at 75.

did not present evidence that its emulsion was not part of the waste removed from the Susquehanna River. As the United States observes, "Alcan's argument ignores the directive to demonstrate what happens when Alcan's waste is mixed with other wastes at the sites." (Dkt. Entry 164 at 5.)

In arguing that its emulsion is not a hazardous substance subject to remediation, Alcan infers that because the substance is biodegradable, it is benign.[4] Alcan's assertion begs the question of why Alcan paid a waste hauler to remove the emulsion and why the waste hauler surreptitiously dumped the emulsion into a mine borehole. Clearly, the emulsion could not be discharged into a river. The emulsion is a pollutant. As our Court of Appeals held, the fact that this pollutant contains some hazardous substances, even below ambient levels, brings it within CERCLA's broad reach. The presence of this pollutant in the oily stew that was remediated subjected Alcan to joint and several liability, unless Alcan presented evidence showing that its pollutant did not contribute to the release and resultant response costs. Alcan's failure to address the issue of the interaction of its pollutant with other pollutants thus warranted imposition of joint and several liability.[5]

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[4]As evidence of the emulsion's biodegradability Alcan points to David J. Lagoe's affidavit from *United States v. Alcan Aluminum Corp.*, 990 F.2d 771 (2nd Cir. 1993), filed January 4, 1991. In that affidavit Lagoe stated that the used emulsion from another facility is used to irrigate lawns in Kentucky pursuant to a government permit. (Dkt. Entry 93, Alcan's Supplemental Brief in Opposition to Plaintiff's Summary Judgment Motion, Exh. "D," at ¶ 13.)

[5]Alcan was essentially invited to present evidence that would have permitted apportionment of liability on a volumetric basis. The record suggests that if liability was

The premise for Alcan's liability is that its emulsion is classified as hazardous under CERCLA. Alcan's perceived unfairness in having to contribute to the cost of remediating the Site at which thousands of gallons of its emulsion was dumped must therefore be remedied by the creators of this liability scheme, Congress.[6]

Alcan was charged with proving that "its waste oil emulsion did not or could not, *when mixed with other hazardous wastes*, contribute to the release and resultant response costs." *Alcan*, 964 F.2d at 270 (emphasis in original). Alcan has not met its burden of proof.

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divided on this basis, Alcan's share of the response cost would be approximately $65,000 (5% of $1,302,290.18), as opposed to $473,790.10 (the difference between the government's response cost of $1,302,290.18 and the amount paid by the settling defendants). Alcan, however, has adamantly refused to pursue this approach, contending that it should bear no liability for the discharge of thousands of gallons of its waste into the Susquehanna River.

[6]Alcan's strident rhetoric and its repeated assertion that its emulsion is like milk ignore the fact that Congress conditioned liability on the release of hazardous substances. Alcan's emulsion contains hazardous substances and was released into the environment at the Site. Under the statutory scheme, a release of a hazardous substance may lead to liability, even joint and several liability, for a polluter whose contaminants do not have chronic adverse consequences for the environment. Common law principles of apportionment of liability can ameliorate the consequences and counter the "strong-arm" settlement tactics that joint and several liability may permit, but Alcan has eschewed that opportunity to minimize its liability.

NOW, THEREFORE, IT IS NOW HEREBY ORDERED THAT Alcan's Motion for Reconsideration (Dkt. Entry 163) is DENIED.

/s/ Thomas I. Vanaskie
U.S. District Judge

Supreme Court, U.S.
FILED
MAY 21 1997
CLERK

No. 96-1494

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALCAN ALUMINUM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress's definition of "hazardous substance" in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601(14), should be interpreted to include a minimum threshold concentration requirement.

2. Whether CERCLA's requirement that the release of waste at a disposal site "cause[] the incurrence of response costs," 42 U.S.C. 9607(a), should be interpreted to require an additional showing that each individual company's hazardous substances independently caused the response costs to be incurred.

3. Whether the court of appeals correctly held that petitioner had failed to demonstrate that the harm from the release is capable of reasonable apportionment, where petitioner declined to introduce any evidence regarding that factual inquiry.

4. Whether the court of appeals erred in applying CERCLA's liability provision, 42 U.S.C. 9607(a), retroactively to petitioner's conduct.

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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A102-A104) is unpublished, but the decision is noted at 96 F.3d 1434 (Table). The opinion of the district court (Pet. App. A50-A74) is reported at 892 F. Supp. 648. The earlier opinion of the court of appeals remanding the case to the district court (Pet. App. A4-A49) is reported at 964 F.2d 252. The initial decision of the district court (Pet. App. A1-A3) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 22, 1996. Pet. App. A104. A petition for rehearing was denied on December 16, 1996. Pet. App.

A105-A106. The petition for a writ of certiorari was filed on March 14, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, to address the severe environmental and public health effects caused by releases of hazardous substances, especially at abandoned and inactive waste disposal sites. H.R. Rep. No. 1016, 96th Cong., 2d Sess., Pt. I, at 22 (1980). As amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, CERCLA empowers the Environmental Protection Agency (EPA) to undertake response actions to clean up hazardous substance sites. 42 U.S.C. 9604(a); 26 U.S.C. 9507.[1] EPA can then recover the response costs it incurred from the parties responsible for the hazardous waste disposal through a cost recovery action. 42 U.S.C. 9607(a).[2] Responsible parties include

> any person who by contract, agreement, or otherwise arranged for disposal or treatment * * * of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and * * * from which

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[1] CERCLA grants authority to the President, who has delegated various powers to the Administrator of EPA. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

[2] Alternatively, EPA can seek an administrative or judicial order requiring the responsible parties to undertake response actions themselves. 42 U.S.C. 9606(a).

> there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

42 U.S.C. 9607(a)(3) and (4).

Under CERCLA, responsible parties are liable for "all costs of removal or remedial action incurred by the United States Government * * * not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(A).[3] CERCLA thus imposes strict liability on responsible parties, subject only to three limited defenses. See 42 U.S.C. 9601(32), 9607(b); Pet. App. A14. Where there are multiple responsible parties who contribute hazardous waste to a site, courts have held that joint and several liability applies. See *id.* at A32-A33.

2. This litigation arises from EPA's cleanup of contamination at the Butler Tunnel site, located on the east bank of the Susquehanna River in Pittston, Pennsylvania. Pet. App. A7-A8. From 1978 to 1979, several liquid waste transport companies collected oily liquid wastes from industrial facilities and disposed of them at the Butler Tunnel site. *Id.* at A8.

Petitioner manufactures aluminum sheet and plate products. Petitioner's production process for aluminum ingots created an emulsion consisting of approximately 95% deionized water and 5% mineral oil. The emulsion also contained fragments of aluminum ingots, which are comprised of various metals such as copper, chromium, cadmium, lead, and zinc. Those metals are hazardous substances under CERCLA. Pet. App. A8-A9; 42 U.S.C. 9601(14). From 1978 to 1979, petitioner contracted with a liquid waste trans-

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[3] The national contingency plan prescribes methods for undertaking removal and remedial actions. See 40 C.F.R. Pt. 300.

port company to dispose of 2.3 million gallons of the emulsion. Pet. App. A9. At least 32,500 gallons of petitioner's emulsion were dumped at the Butler Tunnel site. *Ibid.* Petitioner's emulsion was commingled with other oily liquid wastes disposed of at the same site. See *id.* at A54; C.A. App. 49, 51, 58, 59.

In September 1985, in the wake of Hurricane Gloria, approximately 100,000 gallons of waste contaminated with hazardous substances were released from the Butler Tunnel site into the Susquehanna River, creating a 50-mile long oily sheen on the River. Pet. App. A10. EPA's response efforts resulted in the removal and disposal of more than 80 tons of oil and chemical-soaked debris and soil from the River. *Id.* at A54. The waste oils that EPA removed included the hazardous substances cadmium, chromium, copper, lead, and zinc. *Ibid.*

3. In November 1989, the United States filed suit under CERCLA against twenty defendants, including petitioner, to recover response costs totaling $1,302,290. The United States subsequently entered into consent decrees with all of the defendants except petitioner. Pet. App. A54-A55. The settling defendants agreed to pay $828,500 in response costs and to conduct further response actions, including a remedial investigation/feasibility study to identify additional cleanup actions. See *id.* at A10-A11, A55; Towle Decl. ¶¶ 21-22, 31-32 (C.A. App. 210, 213).

The United States moved for summary judgment against petitioner to recover the remainder of its response costs. Petitioner cross-moved for summary judgment, asserting that its emulsion did not constitute a "hazardous substance" because the metals in the emulsion were at below-ambient levels. Pet. App. A11. Petitioner also asserted that its emulsion could

not have "caused" the release or the incurrence of any response costs. *Ibid.* On May 8, 1991, the district court granted the United States' motion for summary judgment, holding petitioner jointly and severally liable. *Id.* at A1-A3.

The court of appeals affirmed in almost all respects. Pet. App. A4-A38. The court held that CERCLA's definition of "hazardous substance," by its plain language, contains no quantitative threshold requirement. *Id.* at A14-A19. The court also rejected petitioner's causation argument, holding that the United States need demonstrate only that a particular defendant's hazardous substances were deposited at a site from which there was a release or threatened release, and that the release or threatened release caused the incurrence of response costs. *Id.* at A24-A29.

The court of appeals remanded, however, to provide petitioner the opportunity to limit its liability by showing that the harm from its emulsion, although commingled with the other wastes disposed of at the site, is capable of reasonable apportionment. Pet. App. A30-A37. Applying the Restatement (Second) of Torts, the court ruled that petitioner could "avoid liability otherwise established" by demonstrating that there are distinct harms or that there is a reasonable basis for determining the contribution of each cause to a single harm. *Id.* at A33-A35. The court stated that "the analysis will be factually complex as it will require an assessment of the relative toxicity, migratory potential and synergistic capacity of the hazardous waste at issue." *Id.* at A35. The court concluded that "if [petitioner] proves that the emulsion did not or could not, *when mixed with other hazardous wastes*, contribute to the release and the

resultant response costs, then [petitioner] should not be responsible for *any* response costs." *Id.* at A37.

4. On remand, petitioner presented no evidence and declined an opportunity for a hearing on whether its emulsion, when mixed with other hazardous substances at the site, contributed to the release and the resultant response costs. Nor did petitioner address the factual inquiries identified by the court of appeals regarding the characteristics of its emulsion when commingled with other wastes. Pet. App. A51. Rather, petitioner reiterated its argument that it is not liable because its emulsion with below-ambient levels of metals could not cause environmental harm and because EPA did not direct its response actions specifically toward metals. *Id.* at A51-A52.

In June 1995, the district court granted summary judgment to the United States. Pet. App. A50-A74. The court rejected petitioner's contention that its liability should be determined by looking at the metal constituents alone, rather than at the emulsion as a whole. *Id.* at A58-A61. The court found that petitioner "has presented neither evidence nor argument that its used emulsion is environmentally benign," *id.* at A61, and, in fact, "conceded that it cannot prevail on its summary judgment motion if the hazardous substance of concern is the used emulsion itself," *id.* at A59. The district court further found that petitioner "has not compared the chemical composition of its used emulsion to other wastes dumped into the [site]"; has not addressed "whether its used emulsion could have reacted with the other oily wastes"; and has not addressed "the likely products of any chemical reactions." *Id.* at A64-A65. Instead, petitioner premised its entire argument on its "all or nothing" contention that its emulsion contains below-ambient

levels of metals, which allegedly could not cause environmental harm and which allegedly were not specifically targeted by EPA's response actions here. *Id.* at A65.[4]

5. Petitioner appealed. Following the completion of briefing and shortly before oral argument, petitioner filed a motion in the court of appeals to dismiss EPA's action for lack of jurisdiction. Petitioner contended for the first time that CERCLA cannot be applied retroactively to require it to pay for the cleanup of hazardous substances that were disposed of prior to CERCLA's enactment in December 1980. The United States opposed the motion on the grounds that petitioner had waived the argument and that, in any event, CERCLA's response cost liability provision is retroactive. On August 22, 1996, the court of appeals, "[a]fter considering the contentions raised by [petitioner]," issued a judgment order affirming the district court. Pet. App. A102-A104.

ARGUMENT

Petitioner seeks review of issues of statutory interpretation under CERCLA and of factual determinations regarding petitioner's contribution to the harm at the Butler Tunnel site. The rulings of the court of appeals are correct, do not conflict with any decision of this Court or any other court of appeals, and raise no issue warranting review by this Court.

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[4] In the course of denying petitioner's motion for reconsideration, the district court observed that, "[b]ecause it is undisputed that the entire 'hazardous soup' that discharged into the Susquehanna River was remediated, and [petitioner's] emulsion was one of the ingredients of this oily stew, it is incorrect to say that the response action was not directed at the emulsion." Pet. Supp. App. A3.

1. a. Petitioner asserts (Pet. 18-23) that the definition of "hazardous substance" under CERCLA, 42 U.S.C. 9601(14), should be interpreted to impose a threshold concentration requirement. According to petitioner, this Court should read into the statute "scientific and practical underpinnings which may not have been explicitly stated by Congress but are required by common sense." Pet. 19.

CERCLA defines a covered "hazardous substance" as: (A) "any substance" designated pursuant to Section 311(b)(2)(A) of the Clean Water Act, 33 U.S.C. 1321(b)(2)(A); (B) "any element, compound, mixture, solution, or substance" designated pursuant to CERCLA Section 102, 42 U.S.C. 9602; (C) "any hazardous waste having the characteristics identified under or listed" pursuant to Section 3001 of the Solid Waste Disposal Act, 42 U.S.C. 6921; (D) "any toxic pollutant" listed under Section 307(a) of the Clean Water Act, 33 U.S.C. 1317(a); (E) "any hazardous air pollutant" listed under Section 112 of the Clean Air Act, 42 U.S.C. 7412; and (F) "any imminently hazardous chemical substance or mixture" for which EPA has taken action pursuant to Section 7 of the Toxic Substances Control Act, 15 U.S.C. 2606. 42 U.S.C. 9601(14).[5]

Relying on the statute's unambiguous and unqualified language, every court of appeals that has addressed the issue has held that CERCLA's definition of "hazardous substance" contains no minimum concentration level. Pet. App. A14-A19; *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 720-721 (2d

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[5] Petitioner concedes that its emulsion contained compounds (cadmium, chromium, copper, lead, and zinc) that are listed as "hazardous substances" under this definition. Pet. App. A22.

Cir. 1993); *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989) (as amended on rehearing).[6] As the court of appeals correctly held here, "the statute does not, on its face, impose any quantitative requirement or concentration level on the definition of 'hazardous substances.'" Pet. App. A17. CERCLA's text requires only that the "substances under consideration must simply fall within one of the designated categories." *Ibid.* Thus, petitioner's attempt to impose its own "scientific and practical" (Pet. 19) limitation on Congress's language must fail. The court of appeals' task was "to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).[7]

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[6] See also *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 922, 927 (D.C. Cir. 1985); *City of New York* v. *Exxon Corp.*, 744 F. Supp. 474, 483 (1990), adhered to on reconsideration, 766 F. Supp. 177 (S.D.N.Y. 1991); *United States* v. *Western Processing Co.*, 734 F. Supp. 930, 936 (W.D. Wash. 1990); *United States* v. *Conservation Chem. Co.*, 619 F. Supp. 162, 238 (W.D. Mo. 1985); *United States* v. *Wade*, 577 F. Supp. 1326, 1340 (E.D. Pa. 1983).

[7] For similar reasons, petitioner's contention (Pet. 24-26) that the court of appeals transgressed the bounds of Article III by enforcing the statutory language as written is without merit. The separation of powers doctrine dictates that petitioner's policy arguments be directed to Congress, not this Court. *United States* v. *Noland*, 116 S. Ct. 1524, 1528 n.3 (1996) (a party "may or may not have a valid policy argument, but it is up to Congress, not this Court, to revise the [statutory] determination if it so chooses"); see also *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 194 (1978) ("[I]ndividual appraisal[s] of the wisdom or unwisdom of a particular course consciously selected by the Congress [are] to be put aside in the process of interpreting a statute.").

b. Petitioner errs in asserting (Pet. 23) that CERCLA's definition of "hazardous substance" is unconstitutionally vague. A statute is void for vagueness only if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); see also *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) ("economic regulation is subject to a less strict vagueness test" than criminal laws). CERCLA's text plainly provides that a substance is hazardous if it has been listed under any of five specified statutory provisions. 42 U.S.C. 9601(14). The five hazardous metals in petitioner's oil emulsion are listed both under Section 307(a) of the Clean Water Act, 33 U.S.C. 1317(a); see 40 C.F.R. 401.15, and under CERCLA Section 102, 42 U.S.C. 9602; see 40 C.F.R. 302.4 (Table).

Because a substance's hazardous character is readily discernible by consulting the specified lists, the courts of appeals have agreed that CERCLA's definition is not unconstitutionally vague. Pet. App. A46 n.24; *United States* v. *Alcan Aluminum Corp.*, 755 F. Supp. 531, 539 (N.D.N.Y. 1991), aff'd in part, rev'd in part on other grounds, 990 F.2d 711 (2d Cir. 1993). This Court's review is thus not warranted.

2. Petitioner also asserts (Pet. 11-15) that the court of appeals' construction of CERCLA's causation requirement, 42 U.S.C. 9607, is incorrect and conflicts with decisions of the First and Eighth Circuits. Section 9607 provides that a generator of hazardous substances is liable for response costs if its hazardous waste is disposed of at a facility "from which there is a release, or a threatened release which causes the incurrence of response costs."

Petitioner argues that Section 9607 requires a direct causal connection between petitioner's hazardous substances and the government's incurrence of response costs. That contention does not merit further review.

a. Every court of appeals that has addressed the question has rejected petitioner's proposed construction. Pet. App. A24-A29; *Alcan*, 990 F.2d at 721; *United States* v. *Monsanto Co.*, 858 F.2d 160, 170 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).[8]

Petitioner's purported circuit conflict (Pet. 12-14) relies almost entirely on a district court decision, *Acushnet Co.* v. *Coaters Inc.*, 937 F. Supp. 988 (D. Mass. 1996), rather than contrary court of appeals authority. *Acushnet*, moreover, expressly eschews addressing the circumstances at issue in the instant case, because the plaintiffs in that case sought "a more sweeping elimination of causation as an element of the legal test for liability" than the Third Circuit adopted here and because the case involved a private plaintiff rather than an action brought by the government for its response costs. *Id.* at 998-999. In addition, the First Circuit has recognized that "strict liability was intended for releases or threatened releases which cause response costs" and that this strict liability attaches "without reference to whether [the responsible party] caused or contributed to the release or threat of release." *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1152-1153 (1989), decision clarified on other grounds,

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[8] See also *United States* v. *Bliss*, 667 F. Supp. 1298, 1309 (E.D. Mo. 1987); *Wade*, 577 F. Supp. at 1333. But see *Louisiana-Pacific Corp.* v. *ASARCO, Inc.*, 735 F. Supp. 358, 362 (W.D. Wash. 1990).

901 F.2d 3 (1st Cir. 1990); see also *O'Neil* v. *Picillo*, 883 F.2d 176, 178-179 (1st Cir. 1989) (where defendant seeks to avoid joint and several liability, it bears the burden of showing that the harm is divisible), cert. denied, 493 U.S. 1071 (1990).

Likewise, the Eighth Circuit decision cited by petitioner (Pet. 12) actually reaffirms that liability to the United States for response costs under CERCLA "is a matter of strict liability," and, "therefore, is not dependent on any showing of causation or fault." *Farmland Indus., Inc.* v. *Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1339 (1993).[9] Accordingly, the courts of appeals' decisions give no indication that the outcome of the present case would change if it were litigated in a different circuit.

b. The courts of appeals' consistent rejection of petitioner's construction, moreover, is correct. CERCLA's text imposes strict liability upon a person that arranges for disposal of a hazardous substance at a facility "from which there is a release, or a threatened release which causes the incurrence of response costs." 42 U.S.C. 9607. There is no further statutory requirement that the disposal or individual hazardous substance directly cause the release. Petitioner's contention thus cannot be reconciled with Section 9607's language. *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995) (starting point for statutory construction must be the statute's text).[10]

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[9] The Eighth Circuit went on to hold that a private party in a contribution action cannot predicate liability "solely upon section 9607(a) liability to the government, but must also prove causation." *Farmland*, 987 F.2d at 1340.

[10] The legislative history supports Section 9607's plain meaning. Congress specifically rejected an earlier draft of the Section that would have imposed liability on "any person who

c. Finally, petitioner premises its causation argument (Pet. 4, 13) on the factual claim that its emulsion "contained none of the CERCLA Hazardous Substances identified by EPA as having necessitated the Response." The district court found as a factual matter, however, that petitioner's emulsion "was commingled in the waste materials discharged into the Susquehanna River" and that the waste oils removed from the River by EPA "contained cadmium, chromium, copper, lead and zinc." Pet. App. A54. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

3. Petitioner asserts (Pet. 17-18) that the court of appeals deviated from its own mandate regarding the standard for proving divisibility of harm, and that the court's "us[e] [of] silence to escape detection" for effectively overruling its prior decision "so far departs from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's supervisory power." Pet. 17.[11] An alleged intra-

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caused or contributed to the release or threatened release." H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(1)(D) (1980), *reproduced at* 126 Cong. Rec. 26,779 (1980). See *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). Congress deleted the causation language "precisely because it was aware of the difficulties plaintiffs would confront in the multi-generator context if required to prove such a connection." Pet. App. A27. See also *John Hancock Mutual Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993) (with respect to limiting language in a statute, the Court is "directed by those words [that Congress enacted], and not by the discarded draft").

[11] Petitioner asserted the existence of this intra-circuit conflict in its petition for rehearing and suggestion for rehearing

circuit conflict, however, does not ordinarily warrant a grant of certiorari. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). There is no basis for departing from that rule here. This case presents a fundamental and deliberate failure of factual proof by petitioner, not an intra-circuit conflict regarding the appropriate legal standard. Petitioner elected not to present any evidence on remand to meet the standard for divisibility articulated by the court of appeals. Rather, petitioner informed the district court that "all of the issues which the Third Circuit stated should be addressed on remand such as the metals' ability to concentrate and cause a problem are irrelevant to this case." Pet. App. A65.

Petitioner also alleges (Pet. 15-17) that the court of appeals' decision conflicts with decisions of the Second and Fifth Circuits. The court of appeals held, in the initial appeal, that, "if [petitioner] proves that the emulsion did not or could not, *when mixed with other hazardous wastes*, contribute to the release and the resultant response costs," then petitioner should not be responsible for any costs. Pet. App. A37. The Second Circuit, in a companion case addressing petitioner's same emulsion, applied the identical standard. *Alcan*, 990 F.2d at 722. The Fifth Circuit has adopted a similar approach. *In re Bell Petroleum Servs., Inc. (EPA v. Sequa Corp.)*, 3 F.3d 889, 894-902 (1993).[12] This case thus presents no conflict in legal standards

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en banc. The court of appeals declined to grant rehearing. Pet. App. A105-A106.

[12] The Fifth Circuit also noted that the applicability of the Third Circuit's precise divisibility standard was not directly implicated by the facts of its case. *Bell Petroleum*, 3 F.3d at 902.

for this Court to review, and petitioner's charge that the court of appeals silently disregarded this legal standard in its judgment order does not merit further review.[13]

4. Finally, petitioner asserts (Pet. 26) that certiorari should be granted because, in applying CERCLA retroactively to petitioner's hazardous waste disposal, the court of appeals failed to apply this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). That contention does not merit further review.

First, petitioner failed to raise the retroactivity issue until after briefing was completed on the second appeal in the case. Thus, nearly seven years of litigation had elapsed, two district court grants of summary judgment had issued, one appeal was completed, and the second appeal was ready for oral argument before petitioner raised the retroactivity issue for the first time.[14] Petitioner has thus waived any retroactivity argument. See *Laborers' Int'l Union* v. *Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir.) ("An issue is waived unless a party raises it in its opening brief."), cert. denied, 513 U.S. 946 (1994); see also Fed. R. Civ. P. 12(h)(2) (defense of failure to state a claim

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[13] Petitioner also claims (Pet. 16) that the court of appeals' decision is inconsistent with a recent New York district court ruling on remand from the Second Circuit. See *United States* v. *Alcan Aluminum Corp.*, Nos. 87-CV-920, 91-CV-1132, 1996 WL 637559 (N.D.N.Y. Oct. 28, 1996). The district court's alleged departure from Second Circuit precedent, however, can be addressed by the Second Circuit. See R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 178 (7th ed. 1993).

[14] Petitioner also failed to raise the retroactivity issue at oral argument. See C.A. Oral Arg. Tr. (Aug. 7, 1996).

is waived unless made prior to the district court's disposition of the case on the merits). The court of appeals' application of that waiver rule, which parallels this Court's own practice, see *Walters* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 663 n.* (1997), does not present an issue meriting this Court's review.

Petitioner's assertion that the retroactivity question affects the court's subject matter jurisdiction, and thus may be raised at any time, is incorrect. The retroactivity of CERCLA's liability provision, 42 U.S.C. 9607, is an issue of statutory construction governing what law the court should apply, *Landgraf*, 511 U.S. at 250, not the court's power to adjudicate the case in the first instance. See *Bell* v. *Hood*, 327 U.S. 678, 684-685 (1946); cf. 42 U.S.C. 9613(b) (CERCLA's jurisdictional provision).

Nor can petitioner contend that it was unaware of the potential retroactivity claim until after *Landgraf*. The presumption against retroactive legislation that petitioner invokes "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. In any event, petitioner delayed an additional two years after *Landgraf* was decided to raise its argument.

Second, with the exception of one district court, courts consistently have held that CERCLA's liability provision, 42 U.S.C. 9607, applies retroactively.[15]

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[15] See, *e.g.*, *United States* v. *Olin Corp.*, 107 F.3d 1506, 1511-1514 (11th Cir. 1997); *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732-737 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); *Nevada ex rel. Dep't of Transp.* v. *United States*, 925 F. Supp. 691, 696 (D. Nev. 1996); *Kelley* v. *Thomas Solvent Co.*, 714 F. Supp. 1439 (W.D. Mich. 1989); *Amland Properties Corp.* v. *Aluminum Co. of America*,

Petitioner relies on *United States* v. *Olin Corp.*, 927 F. Supp. 1502 (S.D. Ala. 1996), but that decision has since been reversed by the Eleventh Circuit. *United States* v. *Olin Corp.*, 107 F.3d 1506, 1511-1514 (1997). No other court has followed the *Olin* district court.[16] Because there is no conflict in the law and because there is presently only one court of appeals decision applying *Landgraf* to CERCLA's liability provision (and in a manner contrary to petitioner's contention), review by this Court of petitioner's waived retroactivity argument is not warranted.

Third, CERCLA properly applies retroactively to petitioner's conduct. While CERCLA contains no express statement addressing the retroactive application of its cleanup provisions, the statute's language manifests a clear congressional intent to apply the

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711 F. Supp. 784, 790-791 (D.N.J. 1989); *United States* v. *Mottolo*, 695 F. Supp. 615, 621-622 (D.N.H. 1988); *United States* v. *Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 556-558 (W.D.N.Y. 1988); *United States* v. *Dickerson*, 640 F. Supp. 448, 451-452 (D. Md. 1986); *United States* v. *Miami Drum Servs. Inc.*, No. 85-0038-CIV-ARONOVITZ, 1986 WL 15327 (S.D. Fla. Dec. 12, 1986); *United States* v. *Tyson*, No. CIV.A. 84-2663, 1986 WL 9250 (E.D. Pa. Aug. 22, 1986); *United States* v. *Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1397-1399 (D.N.H. 1985); *Conservation Chem. Co.*, 619 F. Supp. at 217-220; *United States* v. *Shell Oil Co.*, 605 F. Supp. 1064, 1072, 1075-1076 (D. Colo. 1985); *Ohio ex rel. Brown* v. *Georgeoff*, 562 F. Supp. 1300, 1302-1314 (N.D. Ohio 1983); see also *Monsanto Co.*, 858 F.2d at 173-175.

[16] See *The Ninth Ave. Remedial Group* v. *Fiberbond Corp.*, 946 F. Supp. 651, 654-664 (N.D. Ind. 1996); *Nova Chems., Inc.* v. *GAF Corp.*, 945 F. Supp. 1098, 1100-1105 (E.D. Tenn. 1996); *Alcan*, 1996 WL 637559, at *2-*5; *Cooper Indus., Inc.* v. *Agway, Inc.*, No. 92-CV-0748, 1996 WL 550128, at *6-*10 (N.D.N.Y. Sept. 23, 1996); *Gould Inc.* v. *A & M Battery & Tire Serv.*, 933 F. Supp. 431, 438 (M.D. Pa. 1996).

liability provision retroactively. Sections 9607(a)(1) and (a)(2) impose liability not only on the current owner or operator of a facility where there has been a release or threat of release, but also on "any person who at the time of disposal of any hazardous substances owned or operated any facility." The language thus reveals Congress's intent to reach persons engaged in hazardous waste disposal prior to CERCLA's enactment. The phrase "at the time of disposal" is clear on its face and is not limited in time. See *Olin*, 107 F.3d at 1513; *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732 (8th Cir. 1986), cert. deined, 484 U.S. 848 (1987).

Likewise, Section 9607(a)(3) imposes liability on "any person who * * * arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances." Section 9607(a)(4) imposes liability on "any person who * * * accepted any hazardous substances for transport to disposal or treatment facilities." Congress's use of the past tense for liability, coupled with Section 9607(a)(2)'s language indicating that the resulting disposal is not time-limited, further evidences Congress's intent to impose liability retroactively. See also 42 U.S.C. 9603(c) (within 180 days of CERCLA's passage, "any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances * * * are or have been stored, treated, or disposed of," shall notify EPA of the existence of such facility).[17]

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[17] In contrast to the cost recovery provisions of Section 9607(a), Congress subjected liability for natural resource dam-

CERCLA's legislative history also reveals Congress's intent to have CERCLA's liability provision apply retroactively. See H.R. Rep. No. 1016, 96th Cong., 2d Sess., Pt. I, at 17 (1980) (identifying existing, notorious dump sites, such as Love Canal, to which CERCLA will apply); S. Rep. No. 848, 96th Cong., 2d Sess. 2, 13 (1980) (statute targets "[t]he legacy of past haphazard disposal of chemical wastes," and its goal is "assuring that those who caused chemical harm bear the costs of that harm"); see also *The Ninth Ave. Remedial Group* v. *Fiberbond Corp.*, 946 F. Supp. 651, 660-661 (N.D. Ind. 1996) (quoting floor statements).[18]

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ages to an express limitation on retroactivity. 42 U.S.C. 9607(f).

[18] The response brief filed by three settling defendants in this action, Beazer Materials and Services, Inc., et al. (Beazer), advances an elaborate theory as to the compromise that resulted in the passage of CERCLA in the Senate (Resp. Br. 17-24). That theory, however, would require the Court to draw inference after inference about purported legislative trade-offs that no court, in nearly 12 years of CERCLA retroactivity litigation, has been willing to draw. See *Olin*, 107 F.3d at 1515 n.20 (Olin's legislative history trade-off arguments "contain what can be described, most charitably, as misstatements of the record"); *Northeastern Pharmaceutical*, 810 F.2d at 736-737; *Ninth Avenue*, 946 F. Supp. at 660-664; *Nevada*, 925 F. Supp. at 695-696; *Shell Oil*, 605 F. Supp. at 1077-1079. Similarly, Beazer's assertion that the Senate compromise bill changed the nature of liability from retrospective to purely prospective overlooks that the cleanup liability provisions from S. 1480 were directly incorporated into the compromise bill. Finally, the fact that the definition of liability under Section 9601(32) refers to the standard of liability under Section 311 of the Clean Water Act, 33 U.S.C. 1321, has no bearing on the question of retroactive liability. Section 9601(32) does not alter

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the four categories of liable persons under Section 9607(a), or address retroactive liability at all.

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NO. 96-1494

IN THE

Supreme Court of the United States

October Term, 1997

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF ON NEW AUTHORITY

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ARGUMENT

On March 14, 1997, Alcan Aluminum Corporation filed a petition with this Court requesting a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, seeking the resolution of pivotal issues of CERCLA liability. Alcan's petition asserted, *inter alia*, a clear conflict between the First and Eighth Circuits on the one hand and the Second and Third Circuits on the other, as to whether a CERCLA plaintiff must demonstrate a causal connection between a defendant's waste and the incurrence of response costs as a predicate to § 107(a) liability. On April 21, 1997, the Court of Appeals for the Fifth Circuit sided with the position taken by the First and Eighth Circuits in *Licciardi v. Murphy Oil USA, Inc.*, No. 96-30202, 1997 U.S. App. LEXIS 7920, printed in the Appendix at A-1. Because *Licciardi* sharply conflicts with the Third Circuit's decision in this case, and exacerbates the conflict among the circuits regarding CERCLA causation, we call it to the Court's attention in this Supplemental Brief.

As we noted in our petition, in *Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146 (1st Cir. 1989) and *Farmland Indus. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1340 (8th Cir. 1993), the First and Eighth Circuits respectively concluded that a prerequisite to CERCLA liability was that the plaintiff demonstrate a causal connection between the CERCLA hazardous substances and the response costs. The Second and Third Circuits, however, do not require a causal connection between the CERCLA hazardous substances and the response costs because they believe that the plaintiff's burden of proof would be too difficult. *See United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993) and

United States v. Alcan Aluminum Corp., 964 F.2d 252, 265 (3d Cir. 1991) (the present case).

In *Licciardi*, the Fifth Circuit joined the First and Eighth Circuits by requiring a showing of causation between the CERCLA hazardous substances and the response costs as a prerequisite to CERCLA liability. The Fifth Circuit's decision in *Licciardi* is in irreconcilable conflict with the decision of the Third Circuit in the present case, which imposed joint and several liability on Alcan for the release of *below* background metal compounds notwithstanding the fact that the undisputed evidence established that there were no metal problems of any kind at the Butler Tunnel site and there were no CERCLA hazardous substances in the Alcan Emulsion which were identified as a basis for a CERCLA response action.

Licciardi is particularly relevant to the present petition because it involved lead, one of the same elemental metals contained in the Emulsion. Like the lead in the Emulsion--in fact, like all of the metal compounds in the Emulsion--the lead in *Licciardi* did not breach the toxic concentration leaching procedure ("TCLP") standard. As the Fifth Circuit pointed out, EPA does not consider such metal hazardous because it is not capable of leaching out of the soil. *Id.* at *5. Moreover, the lead level in the Emulsion was far *below* background levels, whereas the lead level in *Licciardi* was *above* background levels. *Id.* at *6.

The district court in *Licciardi* had imposed CERCLA liability on the defendant in the same manner that the Third Circuit imposed liability on Alcan--exclusively based on that fact that hazardous substances were released without any proof that the

release did or could cause response costs. The district court in *Licciardi* concluded that liability could be imposed under CERCLA provided there was a release of hazardous substances above background levels.[1] *Id.* at *4.

The Fifth Circuit reversed. It effectively rejected the view of the Second and Third Circuits that the causation element of CERCLA § 107(a) simply relates to causation of a *release* and not to causation of response costs. The Fifth Circuit also refused to adopt the position of the Second and Third Circuits that liability automatically attaches to the release of any amount of hazardous substances:

> While *Amoco [Oil Co. v. Borden, Inc.]* allows a CERCLA plaintiff to prove that response costs were caused by a release without resort to an applicable standard of justification, bare proof that there was a release is not enough; as we have explained, liability does not attach to the release of 'any quantity of a hazardous substance.'

Id. at *6 *quoting Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 670-71 (5th Cir. 1989). The Fifth Circuit opined that the hazardous substances released must pose a "threat to the public or the environment." *Id.* Noting that the defendant's lead was not TCLP toxic and that no expert had attempted to link the lead with groundwater tests that demonstrated contamination,

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[1]Even the district court appears to have limited its imposition of liability to the release of above background hazardous substances, whereas the Second and Third Circuits would impose CERCLA liability for the disposal of a substance like garden soil containing metal compounds at background levels.

the Fifth Circuit concluded that the plaintiffs had not made a prima facie case for liability. *Id.* at *5-6. Hence, the *Licciardi* decision tips the balance in favor of Alcan on this fundamental issue and we ask that the Court give it due consideration.

CONCLUSION

For all of the reasons contained in this Supplemental Brief as well as the reasons contained in the Petition of Writ of Certiorari, Petitioner Alcan Aluminum Corporation respectfully requests that this Honorable Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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Plaintiffs-Appellants-Cross-Appellees,

v.

MURPHY OIL USA INC.,
Defendant-Appellee-Cross-Appellant.

No. 96-30202

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

1997 U.S. App. LEXIS 7920

April 21, 1997, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Eastern District of Louisiana. 93-CV-490-N. Edith Brown Clement, U.S. District Judge.

DISPOSITION: REVERSED.

COUNSEL: For AGATHA LICCARDI SPERA, BENJAMIN NAVO, JAMES J LICCIARDI, MARY ANN DISALVO LICCIARDI, wife of James J Licciardi, MARY ANN LICCIARDI NAVO, wife of and Plaintiffs-Appellants-Cross-Appellees: Michael A Fenasci, New Orleans, LA. Manuel A Fernandez, New Orleans, LA.

For MURPHY OIL USA INC, Murphy Oil USA Incorporated, Defendant-Appellee-Cross-Appellant: James F Shuey, Frilot, Partridge, Kohnke & Clements, New Orleans, LA. George A Frilot, III, Robert Beattie McNeal, Frilot, Partridge, Kohnke and Clements, New Orleans, LA.

JUDGES: Before HIGGINBOTHAM, SMITH, and BARKSDALE, Circuit Judges.

OPINION: PER CURIAM:

I

From 1991 through 1993, the Licciardis hired a number of environmental testing and consulting firms to take and test environmental samples from their property located adjacent to Murphy Oil's Meraux refinery in Louisiana. Armed with results of these tests, the Licciardis filed suit under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607, alleging that the samples demonstrate that Murphy contaminated their property with leaded tank bottoms and refinery sludge in violation of environmental law.[1]

[*2]

The bench trial was bifurcated into liability and damages phases. Following the liability phase, the district court entered its findings. The court found that a certain "black tarry substance" from a sample taken from the Licciardis' property came from Murphy's refinery, finding that the level of lead concentration in the soil at the testing site exceeded background levels. The court held that defendant's release of the substance caused plaintiffs' response costs. The district court observed that the "presence of any hazardous substances [above background levels] on plaintiffs' property is sufficient to justify their incurring response costs." After ordering briefs from the parties on

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[1]The Licciardis also made certain state law claims in their complaint. The district court was unable to find sufficient support for these state-law lost profit claims, and decided that portion of the case for Murphy. The Licciardis have not appealed, so we do not revisit that decision here.

damages, the trial court awarded the Licciardis $12,337, the amount which Murphy stipulated to as the Licciardis' expense for testing for substances defined as "hazardous" under CERCLA. Both sides appeal. Murphy contests any finding of liability while the Licciardis assert that all of their expenses on sampling and testing should have been awarded as damages.

II

There are four elements to a CERCLA cost-recovery action, such as the one here: (1) the site must be a "facility" under § 9609(9); (2) [*3] the defendant must be a "responsible person" under § 9607(a); (3) a release or threatened release of a hazardous substance must have occurred; and (4) the release or threatened release must have caused the plaintiff to incur response costs. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989). The first and second of these elements are not in issue here. Murphy is a "responsible person" and its refinery is a "facility." The district court correctly noted that lead is a "hazardous substance" under 40 C.F.R. § 302.4.

In Amoco, we rejected the proposition that CERCLA "liability attaches upon release of any quantity of a hazardous substance." 889 F.2d at 670 (emphasis original). We explained that the question of whether a release has "caused" or justified response costs is tempered by the purpose of the Act. Id. Although we acknowledged that it is "not the exclusive means of justifying response costs, [ ] a plaintiff who has incurred response costs meets the liability requirement as a matter of law if it is shown that any release violates . . . any applicable state or federal standard, including the most stringent." Id. at 671 (emphasis original). [*4] However, the district court's reliance upon a violation of a standard and Amoco was misplaced, as we will explain.

The district court concluded that any lead found in the sample "exceeding background levels" constituted a release that caused the Licciardis' response costs under CERCLA if the lead came from Murphy's refinery. Although the district court did not specify, the record reflects that its reference to "background levels" refers to the 1984 U.S. Geological Survey.

The U.S. Geological Survey measures empirical evidence relating certain topological and geological facts for a point on the globe. It is not a legal standard. We are aware of no environmental law, state or federal, that establishes the U.S. Geological Survey "background level" as a standard, requirement, or criterion. Relatedly, it is not clear that the Survey figure used by the district court was relevant; according to an expert who testified at trial, the "background level" relied upon by the district court was established "30 to 50 miles away from the Meraux refinery."

The trial court also considered the drinking water standard and the toxic concentration leaching procedure (or "TCLP") standard. According [*5] to plaintiffs' expert, the drinking water standard establishes a legally acceptable limit for lead "at the tap," but none of the experts at trial attempted to link the standard to groundwater tests. Moreover, plaintiffs' expert admitted at trial that she had not carried out any groundwater testing, and that there was insufficient data to form any opinion that the Licciardis' property had been affected by groundwater migration from the refinery. As for the TCLP standard, plaintiffs' expert explained that even if a material contains lead, EPA does not consider it "hazardous" unless the lead is capable of "leaching" out of the material. The TCLP standard, she explained, is an extraction procedure under which a scientist simulates a landfill environment with rainfall and acidity controls, then tests for lead in the resulting

leachate. Plaintiffs admitted in their Supplemental Post-Trial Memorandum that the "TCLP analysis was below regulatory levels." Thus, even though they have expended significant effort and resources testing their property and hiring experts, plaintiffs have been unable to offer any evidence that any regulatory standard has been breached.

Without the Geological Survey, [*6] the drinking water standard, or the TCLP standard as possible bases for finding that Murphy's release caused response costs, we ask whether, in the absence of any other evidence, a finding of hazardous substance "above background levels" is sufficient to support a finding that the release caused response costs. As we explained in Amoco, responsible parties are not liable unless there is evidence that they "posed [a] threat to the public or the environment." While *Amoco* allows a CERCLA plaintiff to prove that response costs were caused by a release without resort to an applicable legal standard of justification, bare proof that there was a release is not enough; as we have explained, liability does not attach to the release of "any quantity of a hazardous substance." Id. at 670-71. "The question of whether a release has caused the incurrence of response costs should rest upon a factual inquiry into the circumstances of a case and the relevant factual inquiry should focus on whether the particular hazard justified any response actions." Id. at 670. We have been pointed to no evidence that the found "release" justified the response costs. We cannot sustain the district [*7] court's finding of liability.

We do not reach the issues regarding the proper calculation of damages under CERCLA.

REVERSED.

Supreme Court, U.S.
FILED
JUN 3 1997
OFFICE OF THE CLERK

NO. 96-1494

IN THE

Supreme Court of the United States

October Term, 1997

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

I. THE CONSTRUCTION OF CERCLA SECTIONS 101(14) AND 107(A) URGED BY THE GOVERNMENT WOULD PERPETUATE THE ARBITRARY AND INDISCRIMINATE IMPOSITION OF SUPERFUND LIABILITY.

In opposing Alcan's Petition for Writ of Certiorari, the Government asks this Court's blessing of a construction of CERCLA section 101(14) which undisputedly would render everything in the universe a "hazardous substance". At the same time, the Government asks the Court to endorse the view that CERCLA section 107(a) requires no proof of causation by the plaintiff--at least when that plaintiff is the Government. Under the Government's construction of these tandem provisions, it may recover 95% of its response costs from a generator who disposed of dirt and stone[1] in a landfill being remediated for PCBs, after EPA has settled with a generator who disposed of pure PCBs. If the Court agrees that there is serious reason to doubt that this is what Congress had in mind when it enacted CERCLA, then the Court should review this case.

According to the Government, the Court need not concern itself with outcomes and should simply countenance the mechanical application of an "explicit" statutory definition.[2] In response to Alcan's

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[1]Dirt and stone contain far higher concentrations of the metal compounds than did the Alcan Emulsion.

[2]In fact, the Government picks and chooses when and when not to apply "explicit" statutory language. For example, as we point out below, CERCLA has no explicit language directing that section 107 liability be applied retroactively.

argument that without implicit thresholds the definition of hazardous substances makes no sense and is impermissibly vague, the Government agrees that a statute is void for vagueness if it "fails to give an ordinary person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." Gov. Brief at 10. However, the Government does not explain how a person contemplating the disposal of dirt and stone would have "fair notice" that he might someday be forced to remediate a site where the problem is PCBs, while the generator of those PCBs effectively has been insulated from significant liability by EPA. Yet, that is what this case is about. That is what happens regularly in CERCLA and will continue to happen unless this Court reviews this case.

II. THE RECENT DECISIONS IN *LICCIARDI* AND *ACUSHNET* BELIE THE GOVERNMENT'S CONTENTION THAT THIS CASE INVOLVES A MERE FAILURE OF PROOF, NOT A CONFLICT AMONG THE CIRCUITS REGARDING CAUSATION.

The Government tries to portray this case as a "fundamental and deliberate failure of factual proof," claiming that Alcan refused to put on any evidence concerning the divisibility of harm associated with its waste at the Butler Tunnel site. What the Government neglects to mention is that the district court on remand resolved this case *on summary judgment without a hearing despite uncontroverted facts* that (1) no response was directed toward metals and (2) Alcan's Emulsion contained none of the hazardous substances

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Nonetheless, the Government does not hesitate to look beyond the statutory language to find justifications for retroactive application.

for which response costs were expended.[3] Hence, whether or not commingled with the wastes of others, the Emulsion could not possibly have contributed any of the substances at which the response was directed.[4] In fact, summary judgment was rendered against Alcan on the ground that it did not demonstrate that its Emulsion was "environmentally benign". *Alcan-Butler II*, 892 F.Supp. at 655-56. As we stated in our Petition, nothing is environmentally benign; even water in excess can be environmentally detrimental. If Alcan is guilty of a "failure of proof," it is the failure to prove the impossible.

This case is about conflicting legal standards, not a failure of proof. While acknowledging the causation requirement imposed on the plaintiffs in *Acushnet Co. v. Coaters, Inc.*, 937 F.Supp. 988 (D. Mass. 1996), (applying the First Circuit's position), the Government suggests that *Acushnet* is distinguishable because the case involved private plaintiffs who "sought a more sweeping elimination of causation . . . than the Third Circuit adopted here." Gov. Brief at 11. The Government elaborates no further on its meaning. It is hard to imagine a more sweeping elimination of causation than the burden-shifting "environmentally benign" standard the Third Circuit adopted here.[5]

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[3]*See United States v. Alcan Aluminum Corp.*, 892 F.Supp. 648, 654 and n.9 (M.D. Pa. 1995) [*Alcan-Butler II*]. Nothing in the record supports the Government's assertion that Alcan "refused" a hearing.

[4]The Government's contention that Alcan put on no evidence that its emulsion, when mixed with other hazardous substances at the site did not contribute to the response costs is therefore irrelevant.

[5]The plaintiff in Acushnet failed to establish the necessary causal link between defendant NETT's waste and the

Furthermore the Government gives no reason for seeking special treatment as a plaintiff when the statute gives it none.

The Government contends that the Eighth Circuit in *Farmland Indus., Inc. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335 (1993) supports the elimination of causation as an element of section 107 liability when the government is the plaintiff. That case, however, simply holds that causation is required in a contribution action among PRPs, and in that regard is consistent with the ruling in *Acushnet* that CERCLA liability requires causation.

The Government's mistaken reading of *Farmland* stems from the court's discussion of the propriety of "previous case" jury instructions. In the previous case the district court had held appellant Morrison-Quirk, a landowner-defendant, liable to EPA. Morrison-Quirk's liability in the previous case arose from the fact that during its tenure as landowner, the release of a hazardous substance, Max-Kill 10, had occurred on its property. Max-Kill 10 was the substance driving the EPA's response action. On appeal of the contribution action, the Eighth Circuit held the jury instructions improper because they could have confused the jury in determining causation.

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response costs incurred--even though NETT's wastes were undisputedly "hazardous" and remarkably similar to the wastes driving the response. It is equally hard to imagine why the plaintiff in this case should have no burden of proof whatsoever, particularly since the "hazardous" substances in the Emulsion--below background metals--are completely distinguishable from the substances which necessitated the response at Butler Tunnel.

The Eighth Circuit did not review or discuss the merits of the previous case, which was not appealed. Indeed, causation was irrelevant in the previous case. As a landowner at the time of a release on it property, Morrison-Quirk would have been liable under CERCLA section 107 regardless of who generated the Max-Kill 10 or actually caused the release. Moreover, as the landowner Morrison-Quirk would have been liable to any plaintiff, whether that person was the government or a private party. Hence, *Farmland* lends no support to the Government's claim of a special liability-without-causation standard for itself, nor does it support the Government's claim of uniformity among the courts of appeals on the issue of causation.

The Government neglects to mention the Fifth Circuit's recent decision in *Licciardi v. Murphy Oil USA*, U.S. App. LEXIS 7920 (April 22, 1997)[6], let alone address its exacerbation of the conflict among the circuits regarding causation. In *Licciardi*, a private-plaintiff section 107 action, the Fifth Circuit held that the plaintiffs must prove the release caused response costs to establish liability. Following the Government's logic, *Farmland* would enable it to establish liability when the *Licciardi* plaintiffs were unable to do so under similar facts. The Government apparently believes that had it sued Murphy Oil instead of the *Licciardi* plaintiffs, it would have won in the Fifth Circuit. That seems quite implausible. Equally implausible is the converse--that had the *Licciardi* plaintiffs been able to file their case in the

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[6]*Licciardi* was published more than a month before the Government filed is Brief in Opposition in this case and is addressed in Alcan's Supplemental Brief on New Authority filed with this Court on May 21, 1997

Eighth Circuit, they would have won. This only accentuates the confusion among the Circuits and demonstrates the need for this Court's review.

If *Farmland* truly stood for the elimination of causation as an element of section 107 liability where the government is the plaintiff, it would conflict sharply with the position of the Second and Third Circuits in the *Alcan* cases. The *Alcan* cases are in conflict with the Government's characterization of *Farmland*, since they import causation into the liability scheme in section 107 cases brought by the Government (albeit through the "back door").[7]

Nothing in the Government's opposition justifies its position that it need not show *any* causal connection between a defendant's waste and the response costs it is seeking to recover. The Government simply observes that Congress deleted language from CERCLA which would have imposed liability on "any person who caused or contributed to the release or threatened release" because "it was aware of the difficulties plaintiffs would confront in the multi-generator context if required to prove such a connection." Gov. Brief at 13 n.10. This observation concerning difficulty of proof makes no distinction between and government plaintiffs and private plaintiffs.[8]

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[7]The confusion in the law is further dramatized if one considers that if the Government wishes to enter into consent decrees with certain generators in the context of a government initiated case under section 107, the court must first evaluate the fairness of the decree, including an evaluation of the causal connection between a settling party's waste and the response costs.

[8]We might agree if the issue were whether the Government had to show it was one molecule of TCE versus another

The Government offers no public policy reason, no scientific basis and no common sense justification for its contention that Congress intended private parties to prove causation in section 107 and contribution actions while excusing the government from doing so. Congress could not possibly have intended CERCLA to relieve a technically sophisticated agency like EPA--with a dedicated internal legal staff as well as a specialized enforcement arm in the land and resources division--from the burden of proving a causal connection due to "difficulty of proof", particularly when that burden is regularly imposed on private plaintiffs by courts interpreting the identical statutory language. It is precisely because the Government fails to offer a single plausible justification warranting its special treatment that this Court should review this case.

III. ALCAN PROPERLY CHALLENGED THE COURT'S JURISDICTION TO IMPOSE RETROACTIVE LIABILITY UNDER CERCLA SECTION 107.

This Court should review this case because the *Butler II* panel, without explanation, failed to consider Alcan's motion to dismiss for lack of subject matter jurisdiction under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The ruling in *Butler I* predated this Court's decision in *Landgraf*. The district court's authority on remand was limited to determining

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molecule of TCE which caused the problem before it could impose liability for TCE-related cleanup costs. That is not the type of proof we are discussing. The proof we are discussing is precisely the same that a plaintiff would face in a toxic tort case--that is, did the type of waste contributed by a particular defendant cause plaintiff's alleged injury? This is precisely the same proof that the courts required in *Licciardi* and *Acushnet*.

divisibility. Thus, Alcan properly raised the retroactivity issue on motion before the Third Circuit in *Butler II*. The parties comprehensively briefed the motion, yet the *Butler II* panel entirely ignored it. We believe it is wholly inappropriate for a federal appeals court to ignore a legitimate challenge to its subject matter jurisdiction.

The Government concedes that CERCLA is its sole basis for invoking federal jurisdiction. If CERCLA does not apply retroactively, there not only is no cause of action--there is no federal subject matter jurisdiction--a challenge that can never be waived.[9]

The Government claims the legislative history of CERCLA supports its view that Congress intended section 107 to impose retroactive liability. Simultaneously it criticizes the brief filed with this Court by defendants Beazer Materials and Services, Inc., et al. ("Beazer"), for contending that the legislative history supports the opposite conclusion. The Government criticizes Beazer's brief because "it

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[9]The Government relies exclusively on *Bell v. Hood*, 327 U.S. 678 (1946) for the proposition that Alcan waived its right to challenge the retroactive application of CERCLA. Gov. Brief at 16. However, this Court has given only limited effect to *Bell*. It has dismissed for lack of federal jurisdiction claims that are "wholly insubstantial" and "immaterial under the federal statute" and has looked beyond the jurisdictional allegations on the face of the complaint to determine whether on the undisputed facts the claim arises under a federal statute. If this case does not "arise under CERCLA", there is no subject matter jurisdiction. Moreover, this case falls within the narrow category of cases that could be dismissed both for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted. Federal Rule of Civil Procedure 12(h)(3) precludes waiver of challenges to subject matter jurisdiction.

would require the Court to draw inference after inference about purported legislative trade-offs".

The position of the Government dramatically illustrates why this Court should take this case. With respect to a statute as important as CERCLA, the legal doctrine post-*Landgraf* concerning the ability of courts to give retroactive application to a statute that is silent on the issue appears to be no clearer than it was before *Landgraf*. Two parties can take an ambiguous legislative history and use it to reach inconsistent conclusions. The judicial system demands more certainty and predictability in areas of such importance.

Respectfully submitted,

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Supreme Court, U.S.
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(8)

No. 96-1494

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALCAN ALUMINUM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF ON NEW AUTHORITY

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MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF ON NEW AUTHORITY

On May 21, 1997, petitioner filed a supplemental brief addressing *Licciardi* v. *Murphy Oil USA, Inc.*, 111 F.3d 396 (5th Cir. 1997) (Supp. Br. App. A1-A5). *Licciardi* presents no conflict with the court of appeals' construction of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a), in this case. *Licciardi* correctly holds that a defendant is liable for clean-up costs if it is responsible for disposing of a hazardous substance at a site from which a release or threatened release has occurred, and "the release or threatened release must have caused the plaintiff to incur response costs." Supp. Br. App. A3. That holding is consistent with the plain language of Section 9607(a), as well as with the court of appeals' ruling here. See

Pet. App. A29 (the government "must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the *release* caused the incurrence of response costs").

Licciardi, moreover, involves particular factual circumstances that are not presented in this case. First, *Licciardi* involved a release by a single responsible party and its impact on adjacent property. Supp. Br. App. A3-A4. The present case, by contrast, addressed the liability rules governing the release of commingled wastes disposed of by multiple generators. Second, *Licciardi* involves litigation brought by a private party, rather than an action brought by the government to recover its response costs.

Accordingly, for the reasons discussed herein and on pages 10-12 of our brief in opposition, petitioner's claim of a conflict in the circuits is in error.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JUNE 1997